

1-21-2014

Gailey v. Whiting Clerk's Record v. 1 Dckt. 41605

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IN THE SUPREME COURT OF THE STATE OF IDAHO

BILL GAILEY,

Plaintiff-Appellant,

vs.

KIM WHITING,

Defendant-Respondent.

Supreme Court Case No. 41605

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE MIKE WETHERELL

NATHAN H. NIELSON

ATTORNEY FOR APPELLANT

EAGLE, IDAHO

J. D. MERRIS

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

Bill Gailey vs. Kim Whiting

| Date | Code | User | | Judge |
|-----------|------|----------|---|----------------|
| 3/21/2013 | NCOC | CCSWEECE | New Case Filed - Other Claims | Mike Wetherell |
| | COMP | CCSWEECE | Complaint Filed | Mike Wetherell |
| | SMFI | CCSWEECE | Summons Filed | Mike Wetherell |
| 4/17/2013 | NOAP | CCMEYEAR | Special Appearance (JD Merris for Kim Whiting) | Mike Wetherell |
| 5/1/2013 | MOTN | CCSCOTDL | Motion to Dismiss for Lack of Personal Jurisdiction | Mike Wetherell |
| | MEMO | CCSCOTDL | Memorandum in Support of Motion to Dismiss for lack of Personal Jurisdiction | Mike Wetherell |
| 5/2/2013 | AFFD | CCMEYEAR | Affidavit of Kim Whiting in Support of Motion to Dismiss | Mike Wetherell |
| 5/10/2013 | STIP | CCVIDASL | Stipulation to Enlarge Time for Filing of Affidavit | Mike Wetherell |
| 6/11/2013 | MEMO | CCHEATJL | Memorandum Opposing Defendant's Motion To Dismiss For Lack Of Personal Jurisdiction | Mike Wetherell |
| 6/19/2013 | AFFD | CCMEYEAR | Affidavit of Bill Gailey Opposing Defendant's Motion to Dismiss for Lack of Personal Jurisdiction | Mike Wetherell |
| | AMEN | CCHEATJL | Amended Affidavit Of Bill Gailey Opposing Defendant's Motion To Dismiss For Lack Of Personal Jurisdiction | Mike Wetherell |
| 7/12/2013 | AFFD | CCSCOTDL | Affidavit of Kim Whiting in Response to Plaintiffs Opposition to Motion to Dismiss | Mike Wetherell |
| | AFFD | CCSCOTDL | Affidavit of JD Merris in Response to Plaintiffs Opposition to Motion to Dismiss | Mike Wetherell |
| | REPL | CCSCOTDL | Defendants Reply Memorandum to Plaintiffs Opposition to Motion to Dismiss | Mike Wetherell |
| | NOHG | CCSCOTDL | Notice Of Hearing (8-8-13 @ 3PM) | Mike Wetherell |
| | HRSC | CCSCOTDL | Hearing Scheduled (Motion to Dismiss 08/08/2013 03:00 PM) | Mike Wetherell |
| 7/15/2013 | HRVC | DCOATMAD | Hearing result for Motion to Dismiss scheduled on 08/08/2013 03:00 PM: Hearing Vacated | Mike Wetherell |
| 7/16/2013 | AMEN | CCSWEECE | Amended Notice of Hearing | Mike Wetherell |
| | HRSC | CCSWEECE | Hearing Scheduled (Motion to Dismiss 09/06/2013 01:30 PM) | Mike Wetherell |
| 8/27/2013 | AFFD | CCMARTJD | Second Affidavit of Bill Gailey Opposing Defendants Motion to Dismiss for Lack of Personal Jurisdiction | Mike Wetherell |
| 9/6/2013 | DCHH | CCVILLTL | Hearing result for Motion to Dismiss scheduled on 09/06/2013 01:30 PM: District Court Hearing Held Court Reporter: Nicole Julson Number of Transcript Pages for this hearing estimated: less than 100 | Mike Wetherell |
| 10/7/2013 | ORDR | DCOATMAD | Order Granting Defendant's Motion to Dismiss for Lack of Personal Jurisdiction | Mike Wetherell |

Bill Gailey vs. Kim Whiting

| Date | Code | User | | Judge |
|------------|------|----------|---|----------------|
| 10/7/2013 | CDIS | DCOATMAD | Final Judgment -- Civil Disposition entered for: Whiting, Kim, Defendant; Gailey, Bill, Plaintiff. Filing date: 10/7/2013 | Mike Wetherell |
| | STAT | DCOATMAD | STATUS CHANGED: Closed | Mike Wetherell |
| 11/15/2013 | APSC | CCTHIEBJ | Appealed To The Supreme Court | Mike Wetherell |
| | NOTA | CCTHIEBJ | NOTICE OF APPEAL | Mike Wetherell |

NO. 931 FILED
A.M. 9:31 P.M.

MAR 21 2013

CHRISTOPHER D. RICH, Clerk
By CHRISTINE SWEET
DEPUTY

MARTELLE, BRATTON and ASSOCIATES, P.A.

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Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BILL GAILEY

Plaintiff,

vs.

KIM WHITING

Defendant.

CV 0C 1305171

Case No.

**NEGLIGENCE COMPLAINT
FOR DAMAGES**

PARTIES, JURISDICTION AND VENUE

1. Plaintiff, BILL GAILEY, is an individual and a resident of Pendleton, Oregon.
2. Defendant, KIM WHITING, is an individual and a resident of Wailuku, Hawaii.
3. Defendant, KIM WHITING, is subject to the jurisdiction of this court pursuant to I.C.

§5-514(a) because this cause of action arises from acts and transactions of a business endeavor for profit within the State of Idaho, County of Ada.

4. Additionally, Defendant, KIM WHITING, is subjection to jurisdiction of this court pursuant to I.C. § 5-514(b) as the cause of action arises from the commission of a tortious act within the State of Idaho, County of Ada.

5. This Court has subject matter jurisdiction over this matter as it is a civil negligence claim alleging damages in excess of \$10,000.
6. Venue is proper pursuant to Idaho Code 5-404, as neither party currently resides in Idaho; however the events giving rise to the complaint occurred in Ada County.

FACTS

7. On or about May 2, 1994, Plaintiff purchased a flexible premium variable life insurance policy for \$185,000 from Defendant.
8. On or about April 8, 1999, Plaintiff took a significant loan from cash value of the policy in the amount of \$106,000.
9. Defendant and Plaintiff had no contact between April 2008 and August 2011, when Plaintiff initiated contact.
10. On or about August 2011, Plaintiff contacted Defendant to request advice on what should be done with the existing policy which at the time had a remaining cash value of \$44,946.70 and was being charged monthly interest of approximately \$700 per month.
11. Plaintiff had the financial means to repay the loan amounts in full, however was not sure what the best course of action would be with respect to the policy.
12. Defendant advised Plaintiff that the only course of action available was to surrender the policy and request cash out of the remainder of the cash value.
13. On or about August 18, 2011, Plaintiff upon the advice from the Defendant submitted a Cash Surrender Request.
14. Defendant failed to advise Plaintiff as to any other alternatives available to him.

15. On or about April 2012, Plaintiff prepared his Federal Income Tax Return with the help of a licensed tax consultant.
16. Unbeknownst to the Plaintiff, the action of surrendering the life insurance policy created at taxable gain of \$223,323.00.
17. As a result of Defendant's advice, Plaintiff's tax liability was drastically higher than would have otherwise been.
18. Plaintiff would not have requested to cash out the policy but for Defendant's advice and failure to inform him of any reasonable alternatives to avoid the taxable gain.

COUNT 1 – NEGLIGENCE

19. Defendant had a duty of reasonable care as an investment and retirement specialist to advise Plaintiff of the tax implications of the transaction.
20. Defendant breached the duty of reasonable care by instructing Plaintiff that his sole option was to cash out the policy.
21. Defendant's breach was the proximate cause of a significant tax liability which would not have occurred otherwise, or could have been avoided with reasonable advice.
22. Defendant's breach caused a \$223,323.00 increase in Plaintiff's 2011 taxable income.
23. Plaintiff's damages are the amounts of increased tax liability as set forth in Count 2.

COUNT 2 - DAMAGES

24. For the 2011 tax year, Plaintiff owed and paid \$104,374.00 in Federal income tax.
25. For the 2011 tax year, Plaintiff owed and paid \$31,423.00 in Oregon income tax.
26. If Defendant had not breached his duty of reasonable care, Plaintiff would have only incurred Federal tax liability of \$30,151.00 and Oregon tax liability of \$11,479.00.

27. Therefore, Plaintiff's alleges compensatory damages in the amount of \$94,167 plus any statutory allowable interest.
28. Plaintiff has further suffered irreparable harm through the surrender of the life insurance policy as his age prevents him from being able to purchase a similar policy with a death benefit, however the calculation of this damage is not exact and Plaintiff leaves this issue to be determined by the Court.
29. Pursuant to I.C. §12-120 and §12-121, Plaintiff is seeking reasonable attorney's fees in the amount of \$5,000, if this complaint is not answered and default judgment is entered.
30. Pursuant to I.C. §12-120 and §12-121, Plaintiff is seeking reasonable attorney's fees in the amount of \$1,135.99, for attorney fees paid to Rob Collins of Oregon for advise related to pursuing this matter.
31. Pursuant to I.C. §12-120 and §12-121, Plaintiff reserves his right to be compensated for actual attorney fees as the prevailing party if this matter is contested.
32. Pursuant to I.C. §12-101, Plaintiff is seeking recovery for the costs in bringing this action.

PRAYER FOR RELIEF

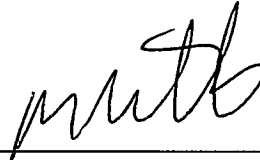
WHEREFORE, the Plaintiff requests the court enter a judgment as follows:

1. For judgment in the amount of \$94,167.00 plus any statutorily allowed interest as compensatory damages; and
2. Further, order an award in the amount deemed by the court of the irreparable harm for the loss of the insurance policy death benefit; and

3. Further, order the award for reasonable attorney fees in the amount of \$6,135.99;
and
4. Further, order costs pursuant to I.C. §12-101.

Dated this day of March 12, 2013

Martelle Bratton and Associates, P.A.



Martin J. Martelle

Martelle, Bratton, and Associates
873 East State Street
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MAR 21 2013

CHRISTOPHER D. RICH, Clerk
By CHRISTINE SWEET
DEPUTY

MIKE WETHERELL

Martelle, Bratton, and Associates
Full Name of Party Filing This Document
873 E. State Street
Mailing Address (Street or Post Office Box)
Eagle, Idaho 83616
City, State and Zip Code
208-938-8500
Telephone Number

MIKE WETHERELL

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Bill Gailey
Plaintiff,
vs.
Kim Whiting
Defendant

Case No.: **CV 00 1305171**
SUMMONS

NOTICE: You have been sued. The court may enter judgment against you without further notice unless you respond. Read the information below.

If you want to defend this lawsuit, you must file a written response (Answer or appropriate Rule 12 I.R.C.P. Motion) to the Complaint at the Court Clerk's office for the above-listed District Court, within 20 days from the service of this Summons.

If you do not file a written response the court may enter a judgment against you without further notice. A letter to the Judge is not an appropriate written response.

The written response must comply with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and include: your name, mailing address and telephone number; or your attorney's name, mailing address and telephone number; and the title and number of this case.

If your written response is an Answer, it must state the things you agree with and those you disagree with that are in the Complaint. You must also state any defenses you have.

You must mail or deliver a copy of your response to the Plaintiff or Plaintiff's attorney (at the address listed above), and prove that you did.

To determine whether you must pay a filing fee with your response, contact the Clerk of the District Court.

If you are considering talking to an attorney, you should do so quickly to protect your legal rights.

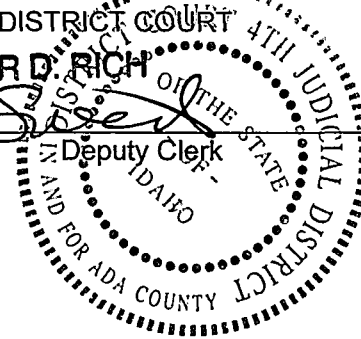
DATED this 21 day of March, 2013

CLERK OF THE DISTRICT COURT

CHRISTOPHER D. RICH

By: C. Sizer

Deputy Clerk



APR 17 2013

CHRISTOPHER D. RICH, Clerk
By ANNAMARIE MEYER
DEPUTY

J. D. Merris
MERRIS & NAUGLE, PLLC
913 West River Street, Suite 420
Boise, ID 83702
Phone: (208) 336-2060
Facsimile: (208) 336-2059
ISB # 2386

Attorney for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BILL GAILEY,

Plaintiff,

vs.

KIM WHITING,

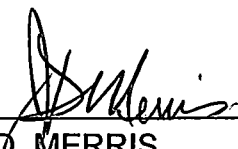
Defendant

Case No. CV OC 2013-05171

SPECIAL APPEARANCE

COMES NOW, the Defendant Kim Whiting, by and through his attorney, J. D. Merris, and enters a special appearance to contest personal jurisdiction in this matter pursuant to Rule 4(i)(2), I.R.C.P.

DATED this 17th day of April, 2013.



J. D. MERRIS
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of April, 2013, I caused to be served a true and correct copy of the foregoing document as follows:

TO:

Martin J. Martelle
Sarah Bratton
MARTELLE, BRATTTON & ASSOC. P.A.
873 East State Street
Eagle, ID 83616

VIA:

☐ Hand Delivery
☐ Federal Express
☐ Certified Mail
☒ U.S. Mail
☒ Facsimile Transmission



J. D. MERRIS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of May, 2013, I caused to be served a true and correct copy of the foregoing document as follows:

TO:

Martin J. Martelle
Sarah Bratton
MARTELLE, BRATTTON & ASSOC. P.A.
873 East State Street
Eagle, ID 83616

VIA:

☐ Hand Delivery
☐ Federal Express
☐ Certified Mail
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☒ Facsimile Transmission



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ISB # 2386

NO. _____
A.M. _____ P.M. 4:50

MAY 01 2013

CHRISTOPHER D. RICH, Clerk
By JAMIE MARTIN
DEPUTY

Attorney for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BILL GAILEY,

Plaintiff,

vs.

KIM WHITING,

Defendant

Case No. CV OC 2013-05171

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS FOR LACK OF
PERSONAL JURISDICTION (RULE
12(b)(2), I.R.C.P.)

INTRODUCTION

The Complaint in this matter alleges that Plaintiff and Defendant had a business relationship based on Plaintiff's 1994 purchase of an insurance policy from Defendant in Idaho. In the years since Plaintiff's purchase of the insurance policy, both parties have moved from Idaho and are citizens of other states. Plaintiff is a resident and citizen of Oregon, and Defendant is a resident and citizen of Hawaii. Defendant's affidavit in support of his challenge to the Court's personal jurisdiction states that he became a citizen and resident of Hawaii in May 2011. Plaintiff's Complaint alleges Defendant was negligent towards him in August 2011. Defendant's affidavit states that he was not in the state of Idaho in August of 2011.

Defendant is challenging the personal jurisdiction of the Court with regard to Plaintiff's Complaint. Defendant's challenge to personal jurisdiction is based on the

Plaintiff being a citizen of Oregon and Defendant being a citizen of Hawaii. Plaintiff's Complaint alleges that Defendant gave negligent advice to Plaintiff in August 2011. The Complaint asks for damages flowing from Defendant's advice that caused increased income tax payments to the federal government and to the state of Oregon.

PERSONAL JURISDICTION OVER NON-RESIDENT

The Court's personal jurisdiction over a non-resident defendant is determined by analysis of the Plaintiff's Complaint in light of I.C. § 5-514, Idaho's long-arm statute, and the Due Process clause of the United States Constitution.

State, Dept. of Finance v. Tenney, 124 Idaho 243, 858 P.2d 782 (Ct. App. 1993) explained at 246-247:

For personal jurisdiction to be obtained, two conditions must be satisfied. First, a statutory basis must be established under I.C. § 5-514, Idaho's long-arm statute.

"The exercise of personal jurisdiction by the courts of this state over those who do any of the acts enumerated in I.C. § 5-514 extends only 'as to any cause of action arising from the doing of any of said acts.' " Houghland Farms, Inc. v. Johnson, 119 Idaho 72, 75, 803 P.2d 978, 981 (1990). Second, constitutional requirements of the due process clause of the fourteenth amendment to the United States Constitution must be met. Schneider v. Sverdsten Logging Co., 104 Idaho 210, 211, 657 P.2d 1078, 1079 (1983). The analysis to be applied under each standard was recently articulated by our Supreme Court in Houghland, above. Before we apply these standards we note that an appellate court will review the question of the existence of personal jurisdiction over a nonresident defendant as one of law which is reviewed freely. Houghland, 119 Idaho at 75, 803 P.2d at 981. In adopting I.C. § 5-514, the legislature intended to exercise all of the jurisdiction available to the state under the due process clause of the United States Constitution. The long-arm statute is to be liberally construed to provide a forum for Idaho residents. Id. (citation omitted).

**Plaintiff's Complaint does not support personal jurisdiction
based on transaction of Idaho business by Defendant.**

The Complaint alleges that I.C. § 5-514(a) applies because Plaintiff's claims arise out of Defendant's transaction of business for profit in the State of Idaho. The alleged business that gave rise to Plaintiff's claim in the Complaint consisted of Plaintiff purchasing an insurance policy from Defendant Whiting in Idaho in 1994, and Plaintiff borrowing a sum against that policy, apparently while Plaintiff was a resident of Idaho, in 1999. Those are the only facts in the Complaint alleged to have taken place in Idaho. Plaintiff's Complaint does not allege a contract cause of action against Defendant Whiting based on those transactions.

Houghland, supra, was concerned with personal jurisdiction of the Idaho courts with regard to an out-of-state person alleged by Plaintiff to have been doing business in Idaho. The Houghland Court stated at 80-81:

The essence of the standard applied by the Supreme Court in Burger King [Corp. v. Rudzewicz], 471 U.S. 462 (1985) is whether the defendant has "purposefully directed" its activities at residents of the forum and whether the litigation results from the alleged injuries that arose out of or relate to those activities. Id. at 472, 105 S.Ct. at 2182, 85 L.Ed.2d at 540. The Court focused on "the foreseeability ... that the defendant's conduct and connection with the forum State are such that [the defendant] should reasonably anticipate being haled into court there." Id. at 474, 105 S.Ct. at 2183, 85 L.Ed.2d at 542 (citation omitted). In interstate contract cases, the Court noted that it had emphasized the "parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other State for the consequences of their activities.'" Id. at 473, 105 S.Ct. at 2182, 85 L.Ed.2d at 541 (citations omitted).

....The Court has noted, however, that "some single or occasional acts" related to the forum may not be sufficient to establish jurisdiction if "their nature and quality and the circumstances of their commission" create only an "attenuated" affiliation with the forum. International Shoe Co. v. Washington, 326 U.S. 310, 318, 66 S.Ct. 154, 159, 90 L.Ed. 95 (1945); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. , at 299, 100 S.Ct. at 568 [62 L.Ed.2d 490 (1980)]. This distinction derives from the belief that, with respect to this category of "isolated" acts, id., at 297, 100 S.Ct., at 567, the reasonable foreseeability of litigation in the forum is substantially diminished.

The business relationship alleged between Plaintiff and Defendant based on the sale of an insurance policy in Idaho is certainly "attenuated". Plaintiff, residing in Oregon, called Defendant, residing in Hawaii, looking for advice regarding the insurance policy sold in Idaho 17 years prior to the telephone call. Plaintiff's Complaint does not fault any of Defendant's actions associated with the sale of the Plaintiff's insurance policy. The Complaint focuses on Defendant's alleged advice given to Plaintiff in August of 2011. Plaintiff was a resident of Oregon when the alleged advice was given. There simply is no basis for personal jurisdiction over Defendant based on I.C. § 5-514(a).

Plaintiff's Complaint alleges a cause of action founded in tort law.

McAlvin v. General Insurance Co. of America, 97 Idaho 777, 554 P.2d 955 (1976) explains at 780:

A person in the business of selling insurance holds himself out to the public as being experienced and knowledgeable in this complicated and specialized field. The interest of the state that competent persons become insurance agents is demonstrated by the requirement that they be licensed by the state, I.C. § 41-1030; pass an examination administered by the state, I.C. § 41-1038; and meet certain qualifications, I.C. § 41-1034. An insurance agent performs a personal service for his client, in advising him about the kinds and extent of desired coverage and in choosing the appropriate insurance contract for the insured. Ordinarily, an insured will look to his insurance agent, relying, not unreasonably, on his expertise in placing his insurance problems in the agent's hands. See discussion in *Riddle-Duckworth, Inc. v. Sullivan*, 253 S.C. 411, 171 S.E.2d 486 (1969). When an insurance agent performs his services negligently, to the insured's injury, he should be held liable for that negligence just as would an attorney, architect, engineer, physician or any other professional who negligently performs personal services.

Plaintiff's cause of action is for negligence not for breach of contract. Plaintiff's claims in tort allegedly arose based on Defendant's advice given to an Oregon resident. Idaho has been selected as the forum to litigate Plaintiff's claims because Plaintiff approached Defendant for advice based on Plaintiff's life insurance transaction where

Defendant was the insurance agent that took place in Idaho 17 years earlier. Plaintiff does not base his claim on defects or shortcomings in the life insurance policy rather Plaintiff bases his claim on advice from Defendant on how to handle the policy that was not living up to Plaintiff's expectations. There simply was no tort committed in Idaho under Plaintiff's facts.

When Plaintiff approached Defendant in August of 2011, Plaintiff was a resident of Oregon. Defendant was a resident of Hawaii. Defendant's advice is alleged to have been negligent such that Plaintiff was damaged financially. The place of any alleged injuries or damages was Oregon. Plaintiff sought advice from Defendant because long ago Defendant was associated with Plaintiff's life insurance policy purchase. Plaintiff's alleged damages manifested themselves as increased federal income taxes and Oregon income taxes. The alleged tort under Plaintiff's facts took place in Oregon. Plaintiff selected an improper forum to litigate his claim. Any connection to the initial life insurance purchase in Idaho was attenuated by the years. Plaintiff, however, alleges that a tort was committed against him. There was no tortious act committed within Idaho.

In Doggett v. Electronics Corp. of America, Combustion Control Division, 93 Idaho 26, 454 P.2d 63 (1969) the Court discussed the location of § 5-514(b)'s tortious acts at 28-29:

Appellant has assigned error in the trial court's failure to find jurisdiction based on I.C. § 5-514(b). As in the Gray [v. American Radiator, 176 N.E.2d 761 (1961)] case, the issues presented are: (1) Was a 'tortious act' committed in Idaho within the meaning of I.C. § 5-514(b); and (2) If so, will the assertion of jurisdiction against respondents amount to a denial of due process?

As to the issue of whether a tort was committed in Idaho, respondents contend, and the trial court ruled, that the negligent act, as well as the injury, must occur in Idaho. The argument is made that to require only the injury to occur in Idaho would do violence to the language of the statute and in effect make the words 'tortious act' read 'commission of a tort in whole or in part.' With this argument we cannot agree. For the

purpose of determining the state with jurisdiction as well as the substantive law which will govern, the state where the injury occurred and the cause of action thus accrued is generally the most logical state for adjustment of rights. This is particularly true where, as here, there are residents of at least four different states involved. The Illinois court's reasoning on this issue is most persuasive:

'To be tortious an act must cause injury. The concept of injury is an inseparable part of the phrase. In determining legislative intention courts will read words in their ordinary and popularly understood sense. (citations) We think the intent should be determined less from technicalities of definition than from considerations of general purpose and effect. To adopt the criteria urged by defendant would tend to promote litigation over extraneous issues concerning the elements of a tort and the territorial incidence of each, whereas the test should be concerned more with those substantial elements of convenience and justice presumably contemplated by the legislature.' 176 N.E.2d 761 at page 763.

The result we reach is virtually compelled by the fact that our statute was based on the Illinois Act. B. B. P. Association, Inc. v. Cessna Aircraft Company, 91 Idaho 259, 264, 420 P.2d 134 (1966). ...

Plaintiff's alleged injuries/damages occurred in Oregon. Oregon is the logical state for the adjustment of rights in this case. Additionally, Oregon law should apply to Plaintiff's claims.

The issues of jurisdiction are intertwined and closely aligned with the choice of law issues.

Grover v. Isom, 137 Idaho 770, 53 P.3d 821 (2002), was a malpractice action brought against a dentist who was a resident of Idaho but practiced in Oregon. Plaintiff suffered injuries in the dentist's office in Oregon. The Court in determining the choice of law question stated at 72-73:

Idaho applies the "most significant relation test" as set forth in the Restatement (Second) of Conflict of Laws § 145 in determining the applicable law. In a tort case the following considerations must be taken into account:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

Seubert Excavators, Inc. v. Anderson Logging Co., 126 Idaho 648, 651, 889 P.2d 82, 85 (1995) (citing Johnson v. Pischke, 108 Idaho 397, 400, 700 P.2d 19, 22 (1985)). "Of these contacts, the most important in guiding this Court's past decisions in tort cases has been the place where the injury occurred." Id. (citing Barringer v. State, 111 Idaho 794, 727 P.2d 1222 (1986)). Since this is a malpractice action, these tort principles apply.

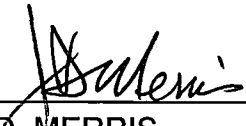
Under McAlvin, supra, Plaintiff's negligence cause of action is akin to a malpractice case against Defendant, an insurance agent. Plaintiff's damages occurred in Oregon; therefore, Oregon law should apply.

CONCLUSION

This case has an Oregon citizen bringing an action in Idaho against a citizen of Hawaii for injuries that occurred in Oregon. There is little or no interest of the state of Idaho in resolving the matter in its court system. Clearly, Oregon – the place of Plaintiff's damages and his residence – or Hawaii – the place of Defendant's residence – have an interest in resolving Plaintiff's claims against Defendant. It appears that Oregon law should be applied to this matter. The State of Idaho is simply a bystander in this action.

The Court should find that, given Defendant's affidavit, Defendant Whiting was, and is, a citizen of Hawaii at all times relevant to this action. Additionally, Plaintiff was, and is, a citizen of Oregon at all times relevant to this action. Plaintiff's Complaint alleges a tort cause of action and, as such, the Complaint must be dismissed for lack of personal jurisdiction over Defendant because there was no tortious act or injury within the state of Idaho. Defendant's alleged negligence did not happen in Idaho and Plaintiff's alleged injury did not happen in Idaho. Because of the location of the alleged acts of negligence and of the alleged injuries and/or damages, I.C. § 5-514 does not operate to subject Defendant to the jurisdiction of the courts of the state of Idaho.

DATED this 1st day of May, 2013.



J. D. MERRIS
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of May, 2013, I caused to be served a true and correct copy of the foregoing document as follows:

TO:

Martin J. Martelle
Sarah Bratton
MARTELLE, BRATTTON & ASSOC. P.A.
873 East State Street
Eagle, ID 83616

VIA:

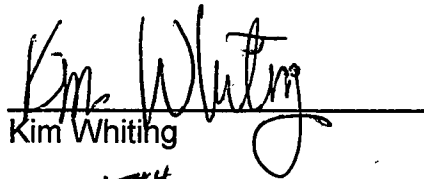
_____ Hand Delivery
_____ Federal Express
_____ Certified Mail
____X____ U.S. Mail
____X____ Facsimile Transmission



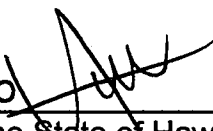
J. D. MERRIS

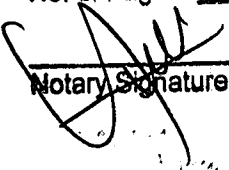
5. That I was a citizen and resident of the State of Idaho prior to May of 2011.
6. That I surrendered my Idaho insurance agent's license on June 11, 2011 and converted my Hawaii insurance agent's license from non-resident to resident status in June 2011, see Exhibit B, State of Hawaii Department of Insurance records from web site indicating termination of nonresident producer status on June 13, 2011 and Exhibit C, State of Hawaii Department Insurance records from web site indicating resident producer status on June 20, 2011.
7. That I was not physically present in the State of Idaho in August of 2011.
- Further affiant sayeth not.

DATED this 15th day of April, 2013.


Kim Whiting

Subscribed and sworn to before me this 15th day of April, 2013.


ANIBAL ALFARO
Notary Public for the State of Hawaii
My commission expires on MAY 17 2013

NOTARY PUBLIC CERTIFICATION
Anibal Alfaro Second Judicial Circuit
Doc. Description: AFFIDAVIT OF KIM WHITING IN
SUPPORT OF MOTION TO DISMISS
No. of Pages: 3 Date of Doc. 4-15-13

Notary Signature Date 4-15-13

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of May, 2013, I caused to be served a true and correct copy of the foregoing document as follows:

TO:

Martin J. Martelle
Sarah Bratton
MARTELLE, BRATTTON & ASSOC. P.A.
873 East State Street
Eagle, ID 83616

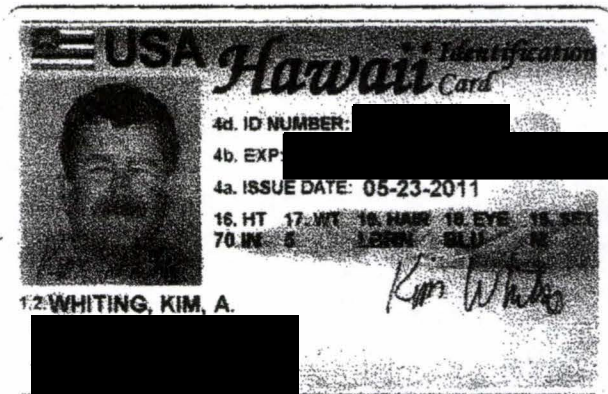
VIA:

☐ Hand Delivery
☐ Federal Express
☐ Certified Mail
☒ U.S. Mail
☒ Facsimile Transmission



J. D. MERRIS

000025





MAILING ADDRESS:
P.O Box 3614
Honolulu, HI 96811-3614

STREET ADDRESS:
335 Merchant St
Room 213
Honolulu, HI 96813
808-586-2788
[Renewal Home](#)
[Feedback](#)
[Privacy Policy](#)
[License Name Search](#)
[Licensee CE Status](#)
[Home - DCCA](#)

License Name Search Details

To start new license search, click [here](#)→

License

License No: [REDACTED] Entity ID: [REDACTED]
NPN: 132235

Vndr Name: KIM ALMA WHITING

Trade Name:

License Status: INACTIVE Effective Date: 06-13-2011

License Type: Nonresident Producer Expiration Date: 04-16-2012

License Classes

| Class | Subclass | Class Status | Effective Date |
|--------------------------------------|----------|--------------|----------------|
| Accident and Health or Sickness | ALL | INACTIVE | 06-13-2011 |
| Life | ALL | INACTIVE | 06-13-2011 |
| Variable Life and Variable Annuities | ALL | INACTIVE | 06-13-2011 |

Current Representatives

Click the Entity Id to get rep classes details.

| Entity Id | Vendor Name | Effective Date |
|-----------|-------------|----------------|
| N/A | | |

Appointed By

| License No | Name | License Type | Class Subclass | Effective Date |
|------------|------|--------------|----------------|----------------|
| N/A | | | | |

Appointment To

| License No | Name | License Type | Class Subclass | Effective Date |
|---------------|------|-----------------|----------------|-------------------|
| N/A | | | | |

Data Information is Current As Of April 15, 2013

Disclaimer

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EXHIBIT B



[BUSINESS](#) | [GOVERNMENT](#) | [EMPLOYMENT](#) |
[COMMUNITY](#) | [VISITING](#) | [EDUCATION](#)

Department of Commerce & Consumer Affairs (DCCA)

MAILING ADDRESS:
P.O Box 3614
Honolulu, HI 96811-3614

License Name Search Details

STREET ADDRESS:
335 Merchant St
Room 213
Honolulu, HI 96813
808-586-2788
[Renewal Home](#)
[Feedback](#)
[Privacy Policy](#)
[License Name Search](#)
[Licensee CE Status](#)
[Home - DCCA](#)

To start new license search, click [here](#)→

License

License No [REDACTED] Entity ID [REDACTED]
NPN: 132235

Vndr Name: KIM ALMA WHITING

Trade Name:

License Status: ACTIVE

Effective Date: 06-20-2011

License Type: Resident Producer Expiration Date: 04-16-2014

License Classes

| Class | Subclass | Class Status | Effective Date |
|--------------------------------------|----------|--------------|----------------|
| Accident and Health or Sickness | ALL | ACTIVE | 06-20-2011 |
| Life | ALL | ACTIVE | 06-20-2011 |
| Variable Life and Variable Annuities | ALL | ACTIVE | 06-20-2011 |

Current Representatives

Click the Entity Id to get rep classes details.

| Entity Id | Vendor Name | Effective Date |
|-----------|-------------|----------------|
| N/A | | |

Appointed By

| License No | Name | License Type | Class | Subclass | Effective Date |
|------------|---|---------------------------------|---------------------------------|----------|----------------|
| 100535 | ALLIANZ LIFE INSURANCE COMPANY OF NORTH | Insurance Company Foreign/Alien | Accident and Health or Sickness | ALL | 06-29-2011 |

EX-10124 C

| | | | | | | |
|---------------|------------------------------------|---------------------------------|--------------------------------------|-------------|--|------------|
| | AMERICA | | | | | |
| | ALLIANZ | | | | | |
| | LIFE | | | | | |
| <u>100535</u> | INSURANCE COMPANY OF NORTH AMERICA | Insurance Company Foreign/Alien | Life | ALL | | 06-29-2011 |
| | FIRST | | | | | |
| <u>323352</u> | ALLIED SECURITIES, INC. | Nonresident Producer | Accident and Health or Sickness | ALL | | 07-20-2011 |
| | FIRST | | | | | |
| <u>323352</u> | ALLIED SECURITIES, INC. | Nonresident Producer | Life | ALL | | 07-20-2011 |
| | PACIFIC | | | | | |
| <u>100556</u> | LIFE INSURANCE COMPANY | Insurance Company Foreign/Alien | Accident and Health or Sickness | Reinsurance | | 11-05-2011 |
| | PACIFIC | | | | | |
| <u>100556</u> | LIFE INSURANCE COMPANY | Insurance Company Foreign/Alien | Life | ALL | | 11-05-2011 |
| | WESTERN | | | | | |
| <u>100794</u> | RESERVE LIFE ASSURANCE CO. OF OHIO | Insurance Company Foreign/Alien | Variable Life and Variable Annuities | ALL | | 03-09-2012 |
| | WESTERN | | | | | |
| <u>100794</u> | RESERVE LIFE ASSURANCE CO. OF OHIO | Insurance Company Foreign/Alien | Accident and Health or Sickness | ALL | | 08-09-2011 |
| | WESTERN | | | | | |
| <u>100794</u> | RESERVE LIFE ASSURANCE CO. OF OHIO | Insurance Company Foreign/Alien | Life | ALL | | 08-09-2011 |

Appointment To

| License No | Name | License Type | Class | Subclass | Effective Date |
|------------|------|--------------|-------|----------|----------------|
| N/A | | | | | |

Data Information is Current As Of April 15, 2013

Disclaimer

NO. _____
A.M. _____ FILED P.M. 12:34

MAY 10 2013

CHRISTOPHER D. RICH, Clerk
By STEPHANIE VIDAK
DEPUTY

J. D. Merris
MERRIS & NAUGLE, PLLC
913 West River Street, Suite 420
Boise, ID 83702
Phone: (208) 336-2060
Facsimile: (208) 336-2059
ISB # 2386

Attorney for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BILL GAILEY,

Plaintiff,

vs.

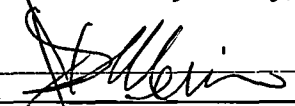
KIM WHITING,

Defendant

Case No. CV OC 2013-05171

STIPULATION TO ENLARGE TIME FOR
FILING OF AFFIDAVIT

COME NOW THE PARTIES, the Plaintiff, Bill Gailey, by and through his attorneys of record, Martelle, Bratton & Associates, P.A., and the Defendant, Kim Whiting, by and through his attorney of record, J. D. Merris and do hereby agree and stipulate that, pursuant to Rule 6(b), I.R.C.P., the time for filing affidavits in support of Defendant's Motion to Dismiss filed in this action on May 1, 2013 may be enlarged by one day.

Dated this 2nd day of May, 2013By: Martelle, Bratton & Associates, P.A.
Attorneys for PlaintiffDated this 2nd day of May, 2013
J. D. Merris
Attorney for Defendant

STIPULATION TO ENLARGE TIME - 1

RECEIVED

JUL 1 2013

Ada County Clerk

MARTELLE, BRATTON, and ASSOCIATES, P.A.

Martin J. Martelle ISB No. 3304

Sarah B. Bratton ISB No. 7771

873 East State Street

Eagle, ID 83616

Telephone: (208) 938-8500

Facsimile: (208) 938-8503

E-mail: attorney@martellelaw.com

Attorney for Plaintiff

NO. 1051 FILED
A.M. 1051 P.M.

JUN 11 2013

CHRISTOPHER D. RICH, Clerk
By JERI HEATON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BILL GAILEY,

Plaintiff,

vs.

KIM WHITING,

Defendant.

Case No. CV OC 2013-05171

**MEMORANDUM OPPOSING
DEFENDANT'S MOTION TO DISMISS FOR
LACK OF PERSONAL JURISDICTION**

INTRODUCTION

The Plaintiff, Mr. Bill Gailey, moves the Court to deny the Defendant's, Mr. Kim Whiting's, complaint for lack of personal jurisdiction. Mr. Whiting has erroneously claimed that maintaining the action would offend due process, asserting that he lacks sufficient minimum contacts to be haled into an Idaho Court. Plaintiff asserts to the contrary that Mr. Whiting's long history of conducting business in Idaho and the work that he did for Mr. Gailey subjects Mr. Whiting to this Court's personal jurisdiction under both Idaho's long-arm statute and the due process clause of the United States Constitution. Mr. Whiting's has not excused himself from Idaho's jurisdiction simply by moving out of state. For the reasons set forth below, this Court should deny Mr. Whiting's motion.

STATEMENT OF FACT

It is undisputed that Mr. Whiting both worked in and was a resident of Idaho until at least May 2011. Aff. Kim Whiting (May 2, 2013) ¶ 5-6. It is also undisputed that Mr. Whiting sold insurance policies and offered support to his customers from an office located in the state of Idaho from at least May 1994 until May 2011. Defendant's Memorandum 3-4 (May 1, 2013). It is also indisputable that Mr. Whiting maintained a business in Idaho, Peak Performance LLC, until October of 2012. Aff. Bill Gailey (May 29, 2013) Exhibit A.

It is further indisputable that Mr. Gailey believed that he was still conducting business with an Idaho based insurer when he contacted Mr. Whiting in August 2011. Aff. Bill Gailey (May 29, 2013) ¶ 8-15. Mr. Whiting maintained a 208-area-code phone number—an Idaho specific area code—and received business phone calls at this number while residing in Hawaii. Aff. Bill Gailey (May 29, 2013) Exhibit E. It is also indisputable that Mr. Whiting maintained an office at 501 W Two River Drive in Eagle, Idaho and 6901 West Emerald Street, Suite 201 in Boise. Aff. Bill Gailey (May 29, 2013) Exhibits A, B, C, & D. These addresses were still publicly viewed as being associated with Mr. Whiting at the time Mr. Gailey sought his advice. Aff. Bill Gailey (May 29, 2013) Exhibit B, C, & D.

STATEMENT OF LAW

In Idaho, the assessment of personal jurisdiction over a defendant is a two-step process. First, courts in this state ask if personal jurisdiction is permitted under Idaho Code section 5-514. *State v. Offshore Finance Limited*, 124 Idaho 243, 246-247 (Idaho Ct. App. 1993). In relevant part, this section asserts jurisdiction over defendants when “the transaction of any business within this state” occurs and when “the commission of a tortious act within this state occurs.” IDAHO CODE § 5-514 (2010).

Then, courts ask whether the assertion of jurisdiction over the defendant would violate the Due Process Clause of the Fourteenth Amendment to the United States' Constitution. *See generally, McAlvin v. General Insurance Co. of America*, 97 Idaho 777 (1976). This latter step requires an

investigation into whether sufficient minimum contacts exist for the defendant to be hailed before the state court. *Burger King Corp v. Rudzewicz*, 471 U.S. 462, 474 (1985). The goal of this analysis is to determine whether the defendant could reasonably foresee that his conduct “and connection with the forum state” would subject him to being summoned into court. *Id.* The process is to examine the defendant’s connection to Idaho and determine if the business or contacts he maintains there are sufficient for a reasonable person to be put on notice. *See Id.*

ARGUMENT

Mr. Whiting’s motion to this court is procedurally insufficient and should be dismissed on those grounds. If this Court does not dismiss on procedural grounds, this Court should dismiss Mr. Whiting’s motion and assert its jurisdiction over Mr. Whiting because he has transacted business in this state—both in conjunction with this case and in general—and committed a tortious act within this state. He further has a sufficient relationship with the state of Idaho to avoid any Due Process violations.

A. Defendant has not raised legal or factual arguments in support of the grounds raised on motion.

Mr. Whiting has failed to raise sufficient legal and factual grounds in its motion. Idaho Rule of Civil Procedure 7(b)(1) requires that motions “state with particularity the grounds . . . under which it is filed.” I.R.C.P. 7(b)(1). This procedural requirement is necessary for this motion to be considered and Mr. Whiting’s failure to raise these grounds is sufficient cause to deny the motion. *Nanney v. Linella, Inc.*, 130 Idaho 477, 481-482, 943 P.2d 67, 71-72 (1997) (quoting, *Patton v. Patton*, 88 Idaho 288, 292, 399 P.2d 262, 264 (1965)) (“The requirement of particularity is ‘real and substantial,’”) and *Patton*, 88 Idaho at 292, 399 P.2d at 264 (internal citation omitted) (“There should be strict compliance with the rules, otherwise they will be whittled away and become meaningless and unenforceable.”).

Mr. Whiting’s grounds are inadequate and this Court should deny the motion because he states

the grounds of this motion as one thing, but then argues another. He specifically brings this motion on the grounds that “the defendant lacks sufficient minimum contacts with the State of Idaho pursuant to the due process clause of the United States Constitution, and accordingly, in the context of the allegations in the Complaint.” Defendant's Motion to Dismiss ¶ 2 (May 1, 2013). However, to support this position the defendant's memorandum blazes a different trail. Defendant's Memorandum (May 1, 2013). Rather than argue the motion's stated grounds, Mr. Whiting attacks the sufficiency of the Complaint under I.C. § 5-514(a) and I.C. § 5-514(b). *Id.* at 2-6. He then concludes with an argument regarding choice of law. *Id.* at 6-7.

In short, Mr. Whiting raises the motion for one reason, but then pivots in his memorandum and raises other issues. The Court should not allow Mr. Whiting to toy with the legal process and blur the line between two distinct doctrines. Since the Idaho Rules of Civil Procedure only retain their meaning and value through enforcement, we ask that the court enforce the rules here and deny Mr. Whiting's motion.

B. Mr. Whiting's business and tortious activities in Idaho allow this Court to assert jurisdiction over him.

Mr. Whiting has subjected himself to Idaho's jurisdictional statute through his business activities. In the arguments Mr. Whiting makes in his motion, he tries to minimize the business that he has transacted in Idaho. He focuses his argument on the bad advice Mr. Whiting provided to Mr. Gailey while trying to sweep the many years of business he has conducted in Idaho under the rug. Defendant's Memorandum 3-4 (May 1, 2013). However, in doing so Mr. Whiting refers directly to business he has conducted in the state of Idaho, stating that he sold an “insurance policy [to Mr. Gailey] in Idaho” in 1994. *Id.* at 3. This action, selling an insurance policy with the goal of recognizing pecuniary gain in the state of Idaho, is sufficient for this Court to exercise jurisdiction under Idaho Code section 5-514.

Furthermore, there is neither statute nor case law that states that just because the contract was

signed seventeen years prior, that this age somehow limits personal jurisdiction. Indeed, such a reading of Idaho Code section 5-514 would upend the rights of many Idaho citizens who seek relief after having their interests damaged while conducting business under a long term contract.

Not only did Mr. Whiting engage in business seventeen years ago in 1994, he also has continued to do business in the state of Idaho as recently as 2012. Mr. Whiting maintained a business, named K & J Whiting, LLC and subsequently Peak Performance LLC, in Idaho from February 23, 2010 through October 15, 2012. Aff. Bill Gailey (May 29, 2013) Exhibit A. This business was located on 501 W Two Rivers Dr., in Eagle, Idaho. *Id.* Mr. Whiting's general business presence in the state of Idaho is sufficient for the court to assert its jurisdiction over him.

In addition to the business he has conducted, Mr. Whiting has availed himself of Idaho's jurisdiction by committing a tortious act here. Even though Mr. Whiting committed his tortious act while he was physically present in Hawaii, the effects of the tortious act can be felt in Idaho and should be characterized as occurring in this state. *See generally, Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 728 (2007) (holding that an out-of-state defendant was held to have committed the tortious act without ever stepping foot within the borders of Idaho).

Mr. Whiting's tortious act should be characterized as occurring here because he held himself out as an Idaho businessman even after leaving for Hawaii. Mr. Gailey believed that he was conducting business with an Idaho based insurer. Not only did Mr. Whiting's company list him as having an office in Boise Idaho, but Mr. Whiting's own business line had a 208 area code. Because Mr. Whiting and his business held himself out as a businessman in Idaho, his tortious actions should be considered as occurring in this state.

Because Mr. Whiting has transacted business in Idaho for pecuniary gain and committed a tort in the State, he is subject to this Court's jurisdiction under the long-arm statute.

C. Defendant's many years of living and conducting business in Idaho is sufficient to satisfy the U.S. Constitution's Due Process requirement.

Mr. Whiting has sufficient contacts with the state of Idaho, so the exercise of jurisdiction would not offend his Due Process rights. Mr. Whiting's motion is grounded on whether "the defendant lacks sufficient minimum contacts with the State of Idaho pursuant to the due process clause of the United States Constitution, and accordingly, in the context of the allegations in the Complaint." Defendant's Motion to Dismiss ¶ 2. Due process requires that a defendant 1) have certain minimum contacts with the forum and 2) that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (U.S. 1945). Essentially the analysis defined by the Supreme Court is to ascertain whether the defendant can expect to be brought before a state's court.

Sufficient minimum contact exists where a defendant purposefully directs his activities at residents of the forum state and the litigation relates to those activities. *Houghland Farms v. Johnson*, 119 Idaho 72, 76 (Idaho 1990). The question of whether assertion of personal jurisdiction comports with fair play and substantial justice involves many factors, but, as the Idaho Supreme Court recognized in *Houghland*, the essential inquiry is whether "the defendant purposefully avails itself of the privilege of conducting activities in the forum State, thus invoking the benefits and protections of its laws." *Id.* at 72, 803 P.2d at 986 (quoting *Hanson v. Denckla*, 347 U.S. 235, 253 (1958)). Moreover, "where a defendant who purposefully directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unjustifiable." *Id.* at 76, 803 P.2d at 982 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)).

International Shoe and its federal and state progeny focus on the extent that non-present entities may reach into a forum state before being subject to personal jurisdiction. They do not stand for the proposition that a post-present defendant may escape liability by running for the border. The

Defendant established sufficient minimum contacts with Idaho by living and working in Idaho; presence and activity establish themselves. Mr. Whiting admits that he was a citizen of the State of Idaho, Aff. Kim Whiting (May 2, 2013) ¶ 5, who only recently established residency in another state. *Id.* at ¶ 4, 5. Furthermore, even after taking up residency in another state, Mr. Whiting operated a business in Idaho until October 15, 2012. Finally, as it relates to this particular action, Mr. Whiting served as the “registered representative” of Western Reserve Life, who contracted to insure an Idaho resident. His relationships within the state of Idaho, and the ongoing representation he has provided Mr. Gailey, would put any reasonable person on notice that they can be brought before an Idaho court.

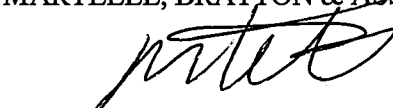
Similarly, it is in keeping—not in excess—of the traditional notions of fair play and substantial justice to expect a businessman to be accountable for his business in the forum where that business resided. The Mr. Whiting availed himself of the privileges of the state by maintaining an Idaho insurance agent's license, *Id.* at ¶ 6; a business in the state of Idaho through 2012, Idaho, Aff. Bill Gailey, (May 29, 2013) ¶¶ 13; several business addresses in Idaho, Aff. Bill Gailey, (May 29, 2013) ¶¶ 6-8, 14; and an Idaho telephone number. *Id.* at ¶¶ 6-8, 15. As it was reasonable for the Mr. Whiting to sue and be sued during his lengthy personal residence in Idaho, it is reasonable for him to expect the same when potential liability arises from past transactions in the state. Thus, this Court should deny Mr. Whiting’s motion and continue to exercise its jurisdiction over this matter.

CONCLUSION

The Court should deny Mr. Whiting’s motion and reaffirm its jurisdiction over this matter.

DATED: 6/10/13

MARTELLE, BRATTON & ASSOCIATES, PA.



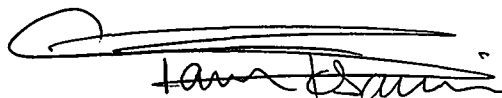
Martin J. Martelle

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day, June 10, 2013, I mailed the foregoing DEFENDANTS' AFFIDAVIT AND MEMORANDUM OF POINTS AND AUTHORITIES to the following recipients via USPS Mail and Facsimile:

J.D. Merris
Merris & Naugle, PLLC
913 West River Street, Suite 420
Boise, ID 83702

MARTELLE, BRATTON & ASSOCIATES, PA.

A handwritten signature in black ink, appearing to read "Taryn M. Basauri", is written over a horizontal line.

Taryn M. Basauri
Tax Paralegal

RECEIVED

JUN 19 2013

MARTELLE, BRATTON, and ASSOCIATES, P.A.

Ada County Clerk

J. Martelle ISB No. 3304

Sarah B. Bratton ISB No. 7771

873 East State Street

Eagle, ID 83616

Telephone: (208) 938-8500

Facsimile: (208) 938-8503

E-mail: attorney@martellelaw.com

Attorney for Plaintiff

NO. 837
A.M. FILED P.M.

JUN 19 2013

CHRISTOPHER D. RICH, Clerk
By ANNAMARIE MEYER
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BILL GAILEY

Plaintiff,

vs.

KIM WHITING

Defendant.

Case No. CV OC 2013-05171

**AFFIDAVIT OF BILL GAILEY
OPPOSING DEFENDANT'S MOTION TO
DISMISS FOR LACK OF PERSONAL
JURISDICTION**

STATE OF IDAHO)

: ss.

County of Ada)

COMES NOW, Bill Gailey (hereafter referred to as Affiant), being first duly sworn upon oath, thereafter deposes and says:

1. That I am the Plaintiff in the above entitled action;
2. That I am a citizen of resident of the State of Oregon;
3. That on May 2, 1994, I resided in Oregon at 705 SE 8th Street, Pendleton 97801.
4. That on May 2, 1994, my wife and I traveled to Defendant Kim Whiting's office in Boise,

AFFIDAVIT OF BILL GAILEY

1
000040

Idaho;

5. That on May 2, 1994, I signed a contract for the purchase of an insurance policy at Defendant Kim Whiting's office, which was located in Boise, Idaho;
6. That from May 2, 1994 to September 9, 2011, I received semi-annual variable universal statements from Western Reserve Life;
7. That the Western Reserve Life statements identified Kim Whiting as a "registered representative";
8. That all statements from Western Reserve Life listed Kim Whiting's contact information as follows:
 - a. Address: 501 W. Two Rivers Drive, Eagle, Idaho 83616-7121
 - b. Telephone: (208) 376-7767;
9. That I contacted Kim Whiting in August of 2011 at the telephone number (208) 376-7767;
10. That the purpose of my telephone call to Kim Whiting was to inquire about the worth of my insurance policy;
11. That Kim Whiting contacted me in August of 2011 from the telephone number (208) 376-7767;
12. That when Kim Whiting contacted me by telephone in August of 2011 he advised me to surrender the policy and request a cash payout of the remaining cash value.
13. That Kim Whiting maintained a business in Idaho during all of 2011:
 - a. On February 23, 2010, Kim Whiting formed a limited liability corporation named K & J Whiting, LLC by filing with the Secretary of State, (See Attached Exhibit A);
 - b. On November 26, 2010, Kim Whiting filed with the Secretary of State to rename K & J Whiting, LLC to Peak Performance LLC, (See Attached Exhibit A);
 - c. That Kim Whiting was a member of this organization until its dissolution, filed with the Secretary of State on October 15, 2012, (See Attached Exhibit A);
 - d. That K & J Whiting, LLC was located at 501 W Two Rivers Dr., Eagle, ID 83616, (See Attached Exhibit A);
14. That Kim Whiting is still listed as having an office in Idaho:
 - a. On April 24, 2013, the website www.localfinancial.net identified World Group Securities, Inc. as a business residing at 6901 West Emerald Street, Suite 201, Boise,

Idaho, 83704, reachable by telephone at (208) 376-7767, (See attached Exhibit B);

b. On April 24, 2013 the website www.manta.com identified Mortgage Concepts, Community Financial Group and Whiting & Co. Mortgage Services, Inc. as business residing at 6901 West Emerald Street, Suite 201, Boise, Idaho, 83704, reachable by telephone at (208) 376-7767, (See attached Exhibit C);

c. On April 25, 2013, Dun & Bradstreet Credibility Corp. (www.dandb.com) identified Whiting & Co. Mortgage Services Inc. as a business residing at 6901 Emerald Street, Suite 201, Boise, Idaho, 83704; reachable by telephone at (208) 367-7767, (See attached Exhibit D);

14. That based upon belief and the following information, Kim Whiting maintains an Idaho telephone number:

a. On December 18, 2012 I accessed a detailed record of my phone records from Charter Communications. Charter Communications identifies Kim Whiting's telephone number, (208) 376-7767, as being located in Boise, Idaho (See attached Exhibit E);

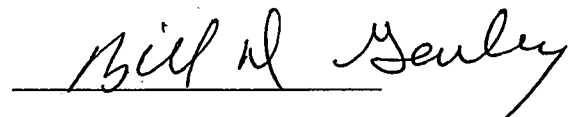
b. Area Code 208 is generally known to be the telephone area code attached to telephone numbers in the State of Idaho.

15. That based upon belief, ¶¶ 3-7 of this document, and the following information, Kim Whiting worked as an insurance broker in Idaho from May 2, 1994 through September 9, 2011:

a. On November 30, 2012, I accessed the website of the Financial Authority Regulatory Authority (www.finra.org), which identified two actions in which the Idaho Department of Finance sought sanctions from Kim Whiting (See attached Exhibit F).

Further affiant sayeth not.

DATED this 13 day of ^{June}~~May~~, 2013.



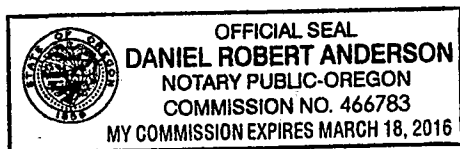
Bill Gailey

State of Idaho
County of Ada

Sworn to and subscribed before me on the 13th day of June,
2013, by Bill Gailey

Daniel Robert Anderson
Notary Public's Signature

(Personalized Seal)



JUN 19 2013

MARTELLE, BRATTON, and ASSOCIATES, P.A.

Martin J. Martelle ISB No. 3304
Sarah B. Bratton ISB No. 7771
873 East State Street
Eagle, ID 83616
Telephone: (208) 938-8500
Facsimile: (208) 938-8503
E-mail: attorney@martellelaw.com

CHRISTOPHER D. RICH, Clerk
By JERI HEATON
DEPUTY

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BILL GAILEY

Plaintiff,

vs.

KIM WHITING

Defendant.

Case No. CV OC 2013-05171

**AMENDED AFFIDAVIT OF BILL
GAILEY OPPOSING DEFENDANT'S
MOTION TO DISMISS FOR LACK OF
PERSONAL JURISDICTION**

STATE OF IDAHO)

: ss.

County of Ada)

COMES NOW, Bill Gailey (hereafter referred to as Affiant), being first duly sworn upon oath, thereafter deposes and says:

1. That I am the Plaintiff in the above entitled action;
2. That I am a citizen and resident of the State of Oregon;
3. That on May 2, 1994, I resided in Oregon at 705 SE 8th Street, Pendleton 97801.
4. That on May 2, 1994, my wife and I traveled to Defendant Kim Whiting's office in Boise,

AFFIDAVIT OF BILL GAILEY

Idaho;

5. That on May 2, 1994, I signed a contract for the purchase of an insurance policy at Defendant Kim Whiting's office, which was located in Boise, Idaho;
6. That from May 2, 1994 to September 9, 2011, I received semi-annual variable universal statements from Western Reserve Life;
7. That the Western Reserve Life statements identified Kim Whiting as a "registered representative;
8. That all statements from Western Reserve Life listed Kim Whiting's contact information as follows:
 - a. Address: 501 W. Two Rivers Drive, Eagle, Idaho 83616-7121
 - b. Telephone: (208) 376-7767;
9. That I contacted Kim Whiting in August of 2011 at the telephone number (208) 376-7767;
10. That the purpose of my telephone call to Kim Whiting was to inquire about the worth of my insurance policy;
11. That Kim Whiting contacted me in August of 2011 from the telephone number (208) 376-7767;
12. That when Kim Whiting contacted me by telephone in August of 2011 he advised me to surrender the policy and request a cash payout of the remaining cash value.
13. That Kim Whiting maintained a business in Idaho during all of 2011:
 - a. On February 23, 2010, Kim Whiting formed a limited liability corporation named K & J Whiting, LLC by filing with the Secretary of State, (See Attached Exhibit A);
 - b. On November 26, 2010, Kim Whiting filed with the Secretary of State to rename K & J Whiting, LLC to Peak Performance LLC, (See Attached Exhibit A);
 - c. That Kim Whiting was a member of this organization until its dissolution, filed with the Secretary of State on October 15, 2012, (See Attached Exhibit A);
 - d. That K & J Whiting, LLC was located at 501 W Two Rivers Dr., Eagle, ID 83616, (See Attached Exhibit A);
14. That Kim Whiting is still listed as having an office in Idaho:
 - a. On April 24, 2013, the website www.localfinancial.net identified World Group Securities, Inc. as a business residing at 6901 West Emerald Street, Suite 201, Boise,

Idaho, 83704, reachable by telephone at (208) 376-7767, (See attached Exhibit B);

b. On April 24, 2013 the website www.manta.com identified Mortgage Concepts, Community Financial Group and Whiting & Co. Mortgage Services, Inc. as business residing at 6901 West Emerald Street, Suite 201, Boise, Idaho, 83704, reachable by telephone at (208) 376-7767, (See attached Exhibit C);

c. On April 25, 2013, Dun & Bradstreet Credibility Corp. (www.dandb.com) identified Whiting & Co. Mortgage Services Inc. as a business residing at 6901 Emerald Street, Suite 201, Boise, Idaho, 83704; reachable by telephone at (208) 367-7767, (See attached Exhibit D);

14. That based upon belief and the following information, Kim Whiting maintains an Idaho telephone number:

a. On December 18, 2012 I accessed a detailed record of my phone records from Charter Communications. Charter Communications identifies Kim Whiting's telephone number, (208) 376-7767, as being located in Boise, Idaho (See attached Exhibit E);

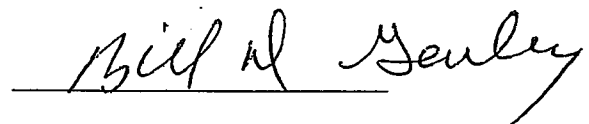
b. Area Code 208 is generally known to be the telephone area code attached to telephone numbers in the State of Idaho.

15. That based upon belief, ¶¶ 3-7 of this document, and the following information, Kim Whiting worked as an insurance broker in Idaho from May 2, 1994 through September 9, 2011:

a. On November 30, 2012, I accessed the website of the Financial Authority Regulatory Authority (www.finra.org), which identified two actions in which the Idaho Department of Finance sought sanctions from Kim Whiting (See attached Exhibit F).

Further affiant sayeth not.

DATED this 13 day of ^{June}~~May~~, 2013.



Bill Gailey

State of Idaho
County of Ada

Sworn to and subscribed before me on the 13th day of June,
2013, by Bill Gailey

Daniel Robert Anderson
Notary Public's Signature

(Personalized Seal)

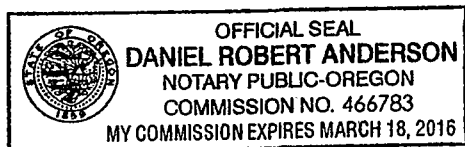


Exhibit A

FILED EFFECTIVE



CERTIFICATE OF ORGANIZATION LIMITED LIABILITY COMPANY

(Instructions on back of application)

10 FEB 23 PM 2:16

SECRETARY OF STATE
STATE OF IDAHO

1. The name of the limited liability company is:

K&J Whiting, LLC

2. The complete street and mailing addresses of the initial designated/principal office:

501 W. TWO RIVERS DR., EAGLE, ID 83616

(Street Address)

(Mailing Address, if different than street address)

3. The name and complete street address of the registered agent:

KIM WHITING

(Name)

501 W. TWO RIVERS DR., EAGLE, ID 83616

(Street Address)

4. The name and address of at least one member or manager of the limited liability company:

Name

Address

KIM WHITING

501 W. TWO RIVERS DR., EAGLE, ID 83616

5. Mailing address for future correspondence (annual report notices):

501 W. TWO RIVERS DR., EAGLE, ID 83616

6. Future effective date of filing (optional):

Signature of organizer(s). (An organizer is a member, or is acting in behalf of a member or members).

Signature

Typed Name:

KIM WHITING

Signature

Typed Name:

Secretary of State use only

g:\corpforms\llc form\cert_org_id.PMD
Revised 07/2008IDAHO SECRETARY OF STATE
02/23/2010 05:00
CK: CASH CT: 206163 BH: 1209309
1 @ 100.00 = 100.00 ORGAN LLC # 2

W90899

000049



AMENDMENT TO CERTIFICATE OF ORGANIZATION LIMITED LIABILITY COMPANY

FILED EFFECTIVE

19 NOV 26 PM 4:38

SECRETARY OF STATE
STATE OF IDAHO

(Instructions on back of application)

1. The name of the limited liability company is:

K&J Whiting, LLC

2. The name of the limited liability company is amended to read:

Peak Performance LLC.

3. The date the certificate of organization was originally filed : 2/23/2010

4. The complete street and mailing addresses of the designated principal office is amended to:

5. The mailing address for future correspondence (annual reports) is amended to:

6. The name and address of the managers/members shall be amended as follows:

| <u>Name</u> | <u>Address</u> | <u>Add</u> | <u>Delete</u> | <u>Other</u> |
|-------------|----------------|--------------------------|--------------------------|--------------|
| _____ | _____ | <input type="checkbox"/> | <input type="checkbox"/> | _____ |
| _____ | _____ | <input type="checkbox"/> | <input type="checkbox"/> | _____ |
| _____ | _____ | <input type="checkbox"/> | <input type="checkbox"/> | _____ |

7. Signature of an authorized person.

Signature

Kim Whiting

Typed Name

Kim Whiting

Signature

Typed Name

Secretary of State use only

IDAHO SECRETARY OF STATE
11/29/2010 05:00
CK: CASH CT: 253897 BH: 1248645
1 P 30.00 = 30.00 ORGAN AMEN # 2

W90899



STATEMENT OF DISSOLUTION LIMITED LIABILITY COMPANY

(Instructions on back of application)

2012 OCT 15 AM 9:52

SECRETARY OF STATE
STATE OF IDAHO

The below named limited liability company has been dissolved pursuant to Section 30-6-701 and 30-6-702, Idaho Code.

1. The name of the dissolved limited liability company is:

Peak Performance LLC

2. The date the certificate of organization was originally filed:

2-23-2010

3. Other information concerning the dissolution (optional):

4. Name and address to return acknowledgement copy of this form to:

Kim Whiting
70 Hauoli St #206 Wailuku HI 96793

5. Signature of a manager, member or authorized person.

Signature

Kim Whiting

Typed Name

Kim Whiting

Signature

Typed Name

Secretary of State use only

IDAHO SECRETARY OF STATE
10/15/2012 05:00
CK: NONE CT: 249423 BH: 1343743
1 P 0.00 = 0.00 DISS LLC # 2

W90899

Exhibit B

[Home](#) > [Idaho](#) > [Boise](#) > Investment Securities[Summary](#) [Reviews](#) [Nearby](#) [Tips](#) [Banks](#)[Post Office](#)[Parking](#)[Police Station](#)[Schools](#)[Churches](#)[Gyms](#)[Vet](#)[Bakery](#)[Dentists](#)[Doctors](#)[Stores](#)**World Group Securities Inc**

6901 W Emerald St # 201, Boise, Idaho 83704

World Group Securities Inc is based in Boise, Idaho.

[Refinance Your Mortgage](#)See how you can lower your mortgage bill by \$200 on avg. Takes 20 mins!
freedommortgage.com/no-lender-fees[AdChoices](#)

This local company is listed in the category Investment Securities. You may call them at (208)376-7767. View contact information, reviews, maps and driving directions for World Group Securities Inc.

[Summary](#)[Reviews](#)[Nearby](#)[Tips](#)

Do you live in Boise and would like to share your experience about World Group Securities Inc?

Customer Service:

1::1

2::2

3::3

4::4

5::5

6::6

7::7

8::8

9::9

Drag and drop the W icon on a road to enter str

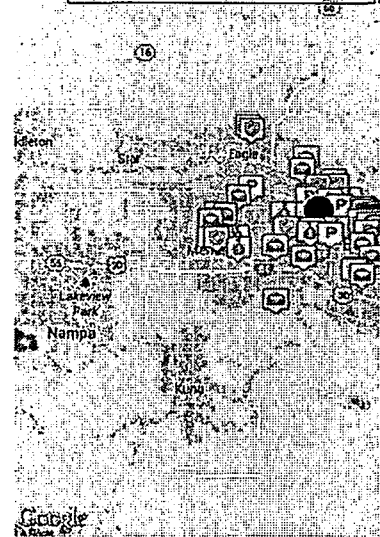
[Update details](#) | [Submit New Listing](#) | [Print address and map](#)
©2013 LocalFinancial.net [Privacy Policy](#)

Exhibit C

New to Manta? Join Free

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J.S. Companies

Mantavideo

Manta Connect

Features

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U.S. - Boise, ID - Financial - Loan Brokers - Boise Mortgage Brokers Arranging for Loans, Using Money of Others - Mortgage Concepts

Company Profile Page

Reports

Map

Web Results

Mortgage Concepts

Community Financial Group, Whiting & Co Mortgage Services, Inc
6901 W Emerald Street # 201
Boise, ID 83704-8660 map

Own This Business?

Edit Company Info

Do You Work Here
or have some other connection?

Write a Recommendation

Follow This Company

Ads

Kiel Mortgage™ Official Site. Amazingly Low Rates. Call Now and Qualify in Minutes!

www.KielMortgage.com

About Mortgage Concepts

Phone: (208) 376-7767 | Website: Join Free to View | Is this your company? Claim This Profile

Top 5 Mortgage Brokers Arranging for Loans, Using Money of Others near Boise, Idaho

1. Hunter Creek Mortgage Inc
 2. Bank of America Mortgage
 3. First Mortgage CO Inc
 4. Bank of America Mortgage
 5. Headlands Mortgage CO
- » See All Mortgage Brokers Arranging for Loans, Using Money of Others

More Details for Mortgage Concepts

Mortgage Concepts in Boise, ID is a private company categorized under Mortgage Brokers Arranging for Loans, Using Money of Others. Our records show it was established in 2001 and incorporated in Idaho. Register for free to see additional information such as annual revenue and employment figures.

2

Small Business Loans
Simple Application - Fast Funding

Select Your Loan Amount

- \$10,000
- \$25,000
- \$50,000
- \$100,000
- \$150,000

On Deck LEARN MORE

Government HARP 2.0 Loans

paramountequity.com/harp2.0
Helping Underwater Homeowners Refi
Unlimited LTV, Credit Score 620+ OK

Boise Window Cleaning

www.sparkleplentycleaning.com
1st time 25% off - 20 yrs exp Kevin
Minton 208-573-3333 or text

8% Annuity Return Secret

SeniorAnnuityAlert.com/Secret-8%
Don't Buy An Annuity Til You See Our
Secret to 8% Guaranteed* For Life

AdChoices

Company Contacts

Is this your company? Claim This Profile

Joni Whiting
Owner

Kim Whiting
President

Search for more contacts

Manta Community Activity

RealSigns Inc.
Check out the new Dura-Flyers on our websites!
56 minutes ago
Add a comment
Follow company

Signal 88 Security - Boise
I love this website, tells you exactly what the crime level is like for Ada County.
<http://www.adaweb.net/mapping/>
yesterday
Add a comment
Follow company

Tim Burroughs Group at Keller Williams Realty-Boise
View our new website at
<http://www.iSellBoiseHomes.com>
2 days ago
Add a comment
Follow company

Boise Gun CO
I can't wait for Cimarron Days this weekend!
The Grubbn BBQ mobile cuisine will be there, selling their amazing BBQ!
Don't forget, KISSN 92.3 will be there

Business Categories

Mortgage Brokers Arranging for Loans, Using Money of Others in Boise, ID Mortgage Broker Real Estate Credit

Mortgage Concepts Business Information

Mortgage Concepts also does business as Community Financial Group, Whiting & Co Mortgage Services, Inc.

Business Information


from 10-12!

And the gun giveaway! Come on down on the 27th and join in on the fun!

2 days ago

Add a comment


Follow company

 **Signal 88 Security - Boise**
 Help us keep the Boise Foothills Safe!
 Here is some helpful trail etiquette to follow. We are responsible for our own safety and security in the Foothills
 thhttp://www.ridgetorivers.org/etiquett...


2 days ago

Add a comment

Follow company

Annual Revenue Estimate  Join Free to View

SIC Code

 Join Free to ViewEmployees 10 to 19
2 **

NAICS Code

522292, Real Estate Credit

Years in Business 12

Products or Services

Is this your company? Add Your Products and Services

Companies like Mortgage Concepts usually offer: No Money Down Mortgages, Mortgages Information, Home Mortgages, Home Mortgage Calculators and Home Mortgage Loans.

Explore companies like - Mortgage Concepts

Search in U.S.



In nearby cities

Boise, ID

Mortgage Brokers Arranging for Loans, Using Money of Others (26)

Meridian, ID

Mortgage Brokers Arranging for Loans, Using Money of Others (6)

Eagle, ID

Mortgage Brokers Arranging for Loans, Using Money of Others (3)

Nampa, ID

Mortgage Brokers Arranging for Loans, Using Money of Others (4)

Caldwell, ID

Mortgage Brokers Arranging for Loans, Using Money of Others (2)

Garden Valley, ID

Mortgage Brokers Arranging for Loans, Using Money of Others (1)

Payette, ID

Mortgage Brokers Arranging for Loans, Using Money of Others (1)

Related searches

Other companies that match "Mortgage Concepts"

Jobs in Boise, ID

All U.S. Mortgage Brokers Arranging for Loans, Using Money of Others »

Other companies on Manta

Hunter Creek Mortgage Inc
Mortgage Brokers Arranging for Loans, Using Money of Others in Eagle, IDBank of America Mortgage
Mortgages in Boise, IDFirst Mortgage CO Inc
Mortgages in Boise, IDBank of America Mortgage
Mortgages in Boise, IDHeadlands Mortgage CO
Mortgages in Boise, ID

Add your company for free.

Click on the reports tab at the top of the page to research company background, detailed company profile, credit and financial reports for Mortgage Concepts.

Reports often include a complete predictive and historical analysis with payment and financial information; information on the identity, operations, profitability and stability of Mortgage Concepts; Details on the company's history, the business background of its management, special events and recent company news. Download Mortgage Concepts financial and company reports.

Business Topics

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000056

Exhibit D

Dun & Bradstreet
CREDIBILITY CORP

Credibility Review™

WHITING & CO. MORTGAGE SERVICES, INC.Company Logo
not available.**Address & Location**

6901 W Emerald St Ste 201 (208) 376-7767 main
Boise, ID 83704-8660 (208) 376-2508 fax

Contact

Kim Whiting

Company Snapshot

| | |
|----------------|---------------|
| Founded | 2001 |
| Incorporated | |
| Annual Revenue | \$ 150,000.00 |
| Employee Count | 2 |
| Industries | |

Company Summary

WHITING & CO. MORTGAGE SERVICES, INC. has been providing Mortgage Brokers Arranging For Loans, Using Money of Others to since 2001.

Company Description

This company currently does not have a description

③

Exhibit E


My Account

[Overview](#)
[My Bill](#)
[My Profile](#)
[My Services](#)
[Online Tools](#)
[My Bill](#) | [Pay Bill](#) | [Recent Activity](#) | [View Statements](#) | [Call Details](#) | [My Services](#) | [Service Details](#) | [Go Paperless](#)

Call Details

87871600102924

Choose Statement: July 26, 2011

Download Call Detail View per page 25 100 21

Choose Number: All

Call Type: All

RESET


Click the arrow next to the information you would like to sort.

| Date ▾ | Time Called From ▾ | Called To ▾ | Where ▾ | Rate ▾ | Minutes ▾ | Amount ▾ |
|----------------|-------------------------|----------------|----------------|---------------------|-----------|----------|
| 06/24 | 4:28 PM (541) 276-9029 | (435) 213-6696 | LOGAN, UT | DD | 20.6 | \$0. |
| 06/27 | 9:21 AM (541) 276-1720 | (541) 437-7781 | ELGIN, OR | DD | 15.5 | \$0. |
| 06/27 | 9:39 AM (541) 276-1720 | (541) 962-0100 | LA GRANDE, OR | DD | 3.3 | \$0. |
| 06/27 | 9:44 AM (541) 276-1720 | (541) 437-7781 | ELGIN, OR | DD | 8.6 | \$0. |
| 06/28 | 10:37 AM (541) 276-9029 | (541) 567-6461 | HERMISTON, OR | DD | 1.7 | \$0. |
| 06/30 | 7:02 AM (541) 276-1720 | (310) 468-5878 | TORRANCE, CA | DD | 0.4 | \$0. |
| 07/05 | 9:44 AM (541) 276-9029 | (818) 291-4975 | GLENDALE, CA | DD | 1.0 | \$0. |
| 07/07 | 7:49 AM (541) 276-1720 | (702) 242-6223 | LAS VEGAS, NV | DD | 89.6 | \$0. |
| 07/07 | 5:12 PM (541) 276-1720 | (310) 418-9555 | CMTN GRDN, CA | DD | 0.6 | \$0. |
| 07/08 | 6:27 AM (541) 276-1720 | (702) 242-6223 | LAS VEGAS, NV | DD | 45.2 | \$0. |
| 07/11 | 7:44 AM (541) 276-1720 | (503) 508-1776 | SALEM, OR | DD | 0.5 | \$0. |
| 07/11 | 8:27 AM (541) 276-1720 | (503) 508-1776 | SALEM, OR | DD | 25.3 | \$0. |
| 07/11 | 9:42 AM (541) 276-1720 | (541) 437-7781 | ELGIN, OR | DD | 0.5 | \$0. |
| 07/13 | 12:48 PM (541) 276-1720 | (541) 437-7781 | ELGIN, OR | DD | 0.6 | \$0. |
| 07/14 | 8:57 AM (541) 276-1720 | (541) 437-7781 | ELGIN, OR | DD | 19.1 | \$0. |
| 07/14 | 9:17 AM (541) 276-1720 | (541) 962-0100 | LA GRANDE, OR | DD | 1.1 | \$0. |
| 07/14 | 9:26 AM (541) 276-1720 | (541) 963-0900 | LA GRANDE, OR | DD | 0.2 | \$0. |
| 07/14 | 9:29 AM (541) 276-1720 | (541) 963-0900 | LA GRANDE, OR | DD | 4.0 | \$0. |
| 07/17 | 8:22 AM (541) 276-9029 | (641) 750-1793 | MARSHALLTN, IA | DD | 2.0 | \$0. |
| 07/19 | 7:49 AM (541) 276-1720 | (208) 376-7767 | BOISE, ID | DD | 0.7 | \$0. |
| 07/20 | 5:59 PM (541) 276-9029 | (208) 376-7767 | BOISE, ID | DD | 0.9 | \$0. |
| 07/21 | 11:51 AM (541) 276-1720 | (541) 571-4038 | HERMISTON, OR | DD | 5.8 | \$0. |
| 07/21 | 3:20 PM (541) 276-9029 | (503) 910-0124 | SALEM, OR | DD | 0.5 | \$0. |
| 07/22 | 8:01 AM (541) 276-1720 | (541) 962-0100 | LA GRANDE, OR | DD | 1.2 | \$0. |
| Total Calls 24 | | | | Total Minutes 248.9 | | \$0. |

Call Details

87871600102924

Choose Statement: August 26, 2011

Download Call Detail 



View per page 25 100 21

Choose Number: All

Call Type: All

RESET

Click the arrow next to the information you would like to sort.

| Date ▼ | Time | Called From ▼ | Called To ▼ | Where ▼ | Rate  | Minutes ▼ | Amount  |
|----------------|----------|----------------|----------------|----------------|--|-----------|--|
| 07/25 | 8:14 AM | (541) 276-1720 | (541) 786-0540 | LA GRANDE, OR | DD | 6.7 | \$0. |
| 07/30 | 6:15 PM | (541) 276-9029 | (719) 321-7592 | COLORDOSPG, CO | DD | 11.0 | \$0. |
| 08/01 | 9:15 AM | (541) 276-1720 | (208) 376-7767 | BOISE, ID | DD | 0.8 | \$0. |
| 08/02 | 10:04 AM | (541) 276-1720 | (541) 962-0100 | LA GRANDE, OR | DD | 1.3 | \$0. |
| 08/03 | 9:00 AM | (541) 276-1720 | (208) 376-7767 | BOISE, ID | DD | 0.6 | \$0. |
| 08/04 | 8:28 AM | (541) 276-1720 | (702) 242-6223 | LAS VEGAS, NV | DD | 53.9 | \$0. |
| 08/04 | 9:26 AM | (541) 276-1720 | (208) 630-3509 | MCCALL, ID | DD | 0.8 | \$0. |
| 08/04 | 9:37 AM | (541) 276-1720 | (541) 962-0100 | LA GRANDE, OR | DD | 1.6 | \$0. |
| 08/04 | 9:41 AM | (541) 276-1720 | (541) 963-0900 | LA GRANDE, OR | DD | 1.6 | \$0. |
| 08/05 | 8:33 AM | (541) 276-9029 | (509) 735-9735 | KENNEWICK, WA | DD | 7.9 | \$0. |
| 08/05 | 11:38 AM | (541) 276-1720 | (541) 437-7781 | ELGIN, OR | DD | 0.7 | \$0. |
| 08/06 | 8:09 AM | (541) 276-1720 | (541) 437-7781 | ELGIN, OR | DD | 1.1 | \$0. |
| 08/07 | 8:43 AM | (541) 276-1720 | (541) 457-6045 | HELIX, OR | DD | 2.1 | \$0. |
| 08/10 | 12:26 PM | (541) 276-1720 | (541) 962-0100 | LA GRANDE, OR | DD | 0.9 | \$0. |
| 08/10 | 2:46 PM | (541) 276-1720 | (208) 939-3010 | EAGLE, ID | DD | 0.8 | \$0. |
| 08/11 | 9:47 AM | (541) 276-1720 | (702) 242-6223 | LAS VEGAS, NV | DD | 48.6 | \$0. |
| 08/11 | 1:30 PM | (541) 276-9029 | (818) 291-4619 | GLENDALE, CA | DD | 0.8 | \$0. |
| 08/15 | 7:15 AM | (541) 276-1720 | (310) 418-9555 | CMTN GRDN, CA | DD | 0.3 | \$0. |
| 08/15 | 5:53 PM | (541) 276-1720 | (208) 376-7767 | BOISE, ID | DD | 3.4 | \$0. |
| 08/16 | 10:01 AM | (541) 276-1720 | (503) 462-3000 | OKGRVWLWKI, OR | DD | 2.1 | \$0. |
| 08/18 | 4:55 PM | (541) 276-9029 | (541) 910-5291 | LA GRANDE, OR | DD | 1.3 | \$0. |
| 08/19 | 8:00 AM | (541) 276-1720 | (206) 398-8231 | SEATTLE, WA | DD | 1.4 | \$0. |
| 08/21 | 10:10 AM | (541) 276-9029 | (719) 321-7592 | COLORDOSPG, CO | DD | 0.6 | \$0. |
| 08/22 | 8:07 AM | (541) 276-1720 | (702) 242-6223 | LAS VEGAS, NV | DD | 59.4 | \$0. |
| Total Calls 24 | | | | | Total Minutes 209.7 | | \$0. |

<https://chrtr.convergentcare.com/chrtr/processCallDetailRecords.do?subAcctNbr=878716...> 12/18/2012

000062

Exhibit F

**Judgment/Lien**

This type of disclosure event involves an unsatisfied and outstanding judgments or liens against the broker.

Disclosure 1 of 1

| | |
|-----------------------------------|---------------------------------|
| Reporting Source: | Broker |
| Judgment/Lien Holder: | AMERICAN EXPRESS CENTURION BANK |
| Judgment/Lien Amount: | \$51,818.64 |
| Judgment/Lien Type: | Civil |
| Date Filed: | 04/28/2011 |
| Type of Court: | DISTRICT |
| Name of Court: | THE FORTH JUDICIAL DISTRICT |
| Location of Court: | ADA COUNTY, ID |
| Docket/Case #: | CV OC 10 22665 |
| Judgment/Lien Outstanding? | Yes |

Registration and Employment History



Other Business Activities

This section includes information, if any, as provided by the broker regarding other business activities the broker is currently engaged in either as a proprietor, partner, officer, director, employee, trustee, agent or otherwise. This section does not include non-investment related activity that is exclusively charitable, civic, religious or fraternal and is recognized as tax exempt.

1.) PEAK PERFORMANCE, LLC; DIRECT OWNER; HOLDING COMPANY OR SUB-S CORP; START DATE: 10/26/2010

2.) ROY AND BIRDIE WHITING LIVING TRUST; CO-SUCCESSOR TRUSTEE; TRUSTEE OR OTHER FIDUCIARY POSITION; START DATE: 3/4/1997

3. EAGLE RENTAL; OWNER; REAL ESTATE (RENTAL PROPERTY/PASSIVE INVESTMENT); START DATE 08/08/2011; 4 HOURS PER MONTH.



Resolution: Order

Does the order constitute a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct? Yes

Resolution Date: 01/22/2004

Sanctions Ordered:

Other Sanctions Ordered: WHITING AGREES TO PASS THE SERIES 26 EXAMINATION WITHIN 90 DAYS OF THE DATE OF THIS AGREEMENT AND ORDER AS A CONDITION TO RETENTION OF HIS OSJ AND BOM ROLES AND SUPERVISORY RESPONSIBILITIES AT WORLD GROUP SECURITIES, INC.

Sanction Details: WHITING AGREES TO PASS THE SERIES 26 EXAMINATION WITHIN 90 DAYS OF THE DATE OF THIS AGREEMENT AND ORDER AS A CONDITION TO RETENTION OF HIS OSJ AND BOM ROLES AND SUPERVISORY RESPONSIBILITIES AT WORLD GROUP SECURITIES, INC.

Reporting Source: Broker

Regulatory Action Initiated By: STATE OF IDAHO, DEPARTMENT OF FINANCE

Sanction(s) Sought: Undertaking

Date Initiated: 06/06/2003

Docket/Case Number: 2003-7-39

Employing firm when activity occurred which led to the regulatory action: WORLD GROUP SECURITIES, INC.

Product Type: No Product

Allegations: ALLEGED VIOLATION OF RULE 80, 119.01, 199.03 AND 124 OF THE IDAHO SECURITIES ACT. REPRESENTATIVE NEITHER ADMITS NOR DENIES THE STATE OF ID, DEPT OF FINANCE'S FINDINGS AND CONCLUSIONS RELATING TO ALLEGED FAILURE TO 1) REPORT OUTSIDE BUSINESS ACTIVITIES, 2) EXERCISE DILIGENT SUPERVISION OVER REPRESENTATIVES UNDER HIS SUPERVISION, 3) ENFORCE COMPANY PROCEDURES, RESULTING IN TECHNICAL VIOLATIONS OF PROCEDURES.

J. D. Merris
MERRIS & NAUGLE, PLLC
913 West River Street, Suite 420
Boise, ID 83702
Phone: (208) 336-2060
Facsimile: (208) 336-2059
ISB # 2386

Attorney for Defendant

NO. _____ FILED _____
A.M. _____ P.M. 4

JUL 12 2013

CHRISTOPHER D. RICH, Clerk
By **STEPHANIE VIDA**
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

BILL GAILEY,

Plaintiff,

vs.

KIM WHITING,

Defendant

Case No. CV OC 2013-05171

**AFFIDAVIT OF KIM WHITING IN
RESPONSE TO PLAINTIFF'S
OPPOSITION TO MOTION TO DISMISS**

State of HAWAII)
) ss.
County of Maui)

Kim Whiting, being first duly sworn, upon oath deposes and states as follows:

1. That I am the Defendant in the above-entitled action;
2. That I have filed a Motion to Dismiss in this matter;
3. That I am, and have been, a citizen and resident of the State of Hawaii since May of 2011;
4. That I am making this affidavit in response to Plaintiff's opposition to my Motion to Dismiss in this matter.

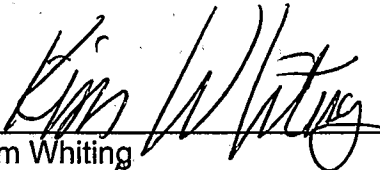
5. That I was a citizen and resident of the State of Idaho prior to May of 2011.
6. That I surrendered my Idaho insurance agent's license on June 11, 2011. See Exhibit A, State of Idaho Department of Insurance records indicating my Request for Clearance and the Department's official clearance of my license effective June 13, 2011.
7. That I converted my Hawaii insurance agent's license from non-resident to resident status effective June 20, 2011, see Exhibit B, State of Hawaii Department of Insurance Resident Producer Certificate.
8. That I was associated with Whiting & Co. Mortgage Services, Inc. for a period of time while I lived in Idaho; however, Whiting & Co. Mortgage Services was dissolved on July 6, 2009. See Exhibit C, Idaho Secretary of State records indicating Articles of Dissolution filed July 6, 2009.
9. That Whiting & Co. Mortgage Services operated under the assumed business names of Community Financial Group and Mortgage Concepts. See Exhibits D, Idaho Secretary of State records indicating the use of the assumed business name of Community Financial Group effective April 25, 2002 and Exhibit E, Idaho Secretary of State records indicating the amendment of the assumed business name of Community Financial Group to Mortgage Concepts effective October 26, 2004.
10. That thru 2012, I, as a broker, was associated with securities firms that were registered with the Financial Industry Regulatory Authority, FINRA. As such, my professional qualifications and history was available for

review by the public through the FINRA website's BrokerCheck function.


A complete copy of my BrokerCheck report is attached as Exhibit F.

Further affiant sayeth not.

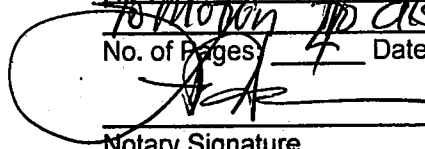
DATED this 8th day of July, 2013.


Kim Whiting

Subscribed and sworn to before me this 8th day of July, 2013.


Notary Public for the State of Hawaii
My commission expires on May 17, 2017

NOTARY PUBLIC CERTIFICATION

Dawn Villaverde, Second Judicial Circuit
Doc. Description: Affidavit of Kim Whiting
Plaintiff's opposition
to motion to dismiss
No. of Pages: 7 Date of Doc. 7/8/13
 7/8/13
Notary Signature Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of July, 2013, I caused to be served a true and correct copy of the foregoing document as follows:

TO:

Martin J. Martelle
Sarah Bratton
MARTELLE, BRATTTON & ASSOC. P.A.
873 East State Street
Eagle, ID 83616

VIA:

☐ Hand Delivery
☐ Federal Express
☐ Certified Mail
☒ U.S. Mail
☒ Facsimile Transmission



J. D. MERRIS

EXHIBIT A

REQUEST FOR LETTER OF CLEARANCE FROM THE STATE OF IDAHO

ATTN: AGENT LICENSING
IDAHO DEPARTMENT OF INSURANCE
700 W STATE ST FL 3
PO BOX 83720
BOISE ID 83720-0043

Please forward a Letter of Clearance for the state of Idaho
for Kim Whiting Idaho license # 19317
Name of producer

EXP 4/30/12

Please forward this letter of clearance to my current address:

70 Hauoli St # 206
Wailuku HI 96793

EMAIL: JONI.WHITING@YAHOO.COM

My phone number is 808 244-7112

My license is enclosed ☒

A loss of license affidavit is attached ☐

I understand that my license will be cancelled upon issuance of the letter of clearance and that I will not be able to conduct insurance business in Idaho until I notify this Department with a letter of certification from the new domicile state and signed request to reinstate my license as a non-resident, along with all new address, phone, fax and email information.

NO FEE REQUIRED

INS-LIC-CLEAR-07

EXHIBIT A

**Idaho
License Clearance**

William W. Deal, Director

IDAHO DEPARTMENT OF INSURANCE

This is an official clearance issued by the State of Idaho, valid without signature and seal.

KIM ALMA WHITING
70 HAUOLI ST APT 206
WAILUKU HI 96793

Date: June 13, 2011

NPN: 132235

The producer has held the following licenses in the State of Idaho:

KIM ALMA WHITING

| License Type | Qualification | Inactive Date | Inactivation Reason | License Number |
|-------------------|---------------------|---------------|---------------------|----------------|
| Resident Producer | | 06-13-2011 | Voluntary Surrender | 19317 |
| | Disability (Health) | 06-13-2011 | Voluntary Surrender | |
| | Life | 06-13-2011 | Voluntary Surrender | |
| | Variable | 06-13-2011 | Voluntary Surrender | |

ACKNOWLEDGED AND
PROCESSED
JUN 13 2011
BY ASW
IDAHO DEPARTMENT OF INSURANCE

Idaho License Clearance

This letter certifies that on the date it was produced, the referenced licensee was cleared from licensure by the Idaho Department of Insurance for the license type(s) indicated.

The licensee was in good standing unless otherwise indicated.

The subject was qualified for the license(s) indicated.

EXHIBIT A

TERM'D AGNT / AGNCY REQUEST

EFF DATE: 6-13-11

MAIL DATE: 6-16-11

PROCESSED BY: JB

000073

EXHIBIT B



STATE OF HAWAII
INSURANCE DIVISION
DEPARTMENT OF COMMERCE & CONSUMER AFFAIRS

RESIDENT PRODUCER
KIM ALMA WHITING

License Number: 385054

Entity ID: 208941

Effective Date: JUN 20, 2011

Expiration Date: APR 16, 2014

Continuing Ed Due Date: APR 16, 2014

This will certify that pursuant to the licensing requirements of the State of Hawaii Revised Statutes, the person named on this license is authorized to act in the following capacity:

License Classes - Subclasses

Accident and Health or Sickness

Life

Variable Life and Variable Annuities

Effective Date

JUN 20, 2011

JUN 20, 2011

JUN 20, 2011

Business Address:

KIM ALMA WHITING
70 HAUOLI ST STE 206
WAILUKU, HI 96793
USA

INSURANCE COMMISSIONER

LITHO IN U.S.A.

© GOES 7/8
All Rights Reserved

EXHIBIT C

FILED EFFECTIVE



ARTICLES OF DISSOLUTION

(General Business and Professional Corporations)

To the Secretary of State of Idaho
Pursuant to Title 30, Chapter 1 and 13, Idaho Code, the
undersigned corporation has elected to dissolve.

09 JUL -6 AM 9:15

SECRETARY OF STATE
STATE OF IDAHO

1. The name of the corporation is:

Whiting & Co. Mortgage Services, Inc.

2. The date the dissolution was authorized is: 07/01/2009

3. The dissolution was approved by the shareholders as follows:

| | |
|---|----------|
| a) The number of shares entitled to vote: | <u>1</u> |
| b) The number voting for dissolution: | <u>1</u> |
| c) The number voting against dissolution: | <u>0</u> |

4. (optional) The dissolution shall be effective on _____.

(The articles will be effective on the date filed with the Secretary of State, unless a future date is specified.)

Dated: 7/1/09

Signature: Joni Whiting

Typed Name: Joni Whiting

Capacity: Owner/President

Customer Acct #:

(if using pre-paid account)

Secretary of State use only

g:\corp\corp form\articles of dissolution_jrnf01.p65
Revised 07/2002

IDAHO SECRETARY OF STATE
07/06/2009 05:00
CK: 3627 CT: 238558 DN: 1177510
1 @ 38.00 = 38.00 PROF D1330 0 2

Web Form

C141599

EXHIBIT C

000077

EXHIBIT D



CERTIFICATE OF ASSUMED BUSINESS NAME

FILED/EFFECTIVE

02 APR 25 AM 9:06

Pursuant to Section 53-504, Idaho Code, the undersigned submits for filing a certificate of Assumed Business Name.

SECRETARY OF STATE
STATE OF IDAHO

Please type or print legibly.

NOTE: See instructions on reverse before filing.

1. The assumed business name which the undersigned use(s) in the transaction of business is:

Community Financial Group

2. The true name(s) and business address(es) of the entity or individual(s) doing business under the assumed business name:

| Name | Complete Address |
|---|-------------------------------|
| <u>Whiting & Co. Mortgage Services Inc.</u> | <u>6901 W. Emerald St 201</u> |
| <u>C 141599</u> | <u>BOISE ID 83704</u> |

3. The general type of business transacted under the assumed business name is:

- | | |
|---|--|
| <input type="checkbox"/> Retail Trade | <input type="checkbox"/> Transportation and Public Utilities |
| <input type="checkbox"/> Wholesale Trade | <input type="checkbox"/> Construction |
| <input type="checkbox"/> Services | <input type="checkbox"/> Agriculture |
| <input type="checkbox"/> Manufacturing | <input type="checkbox"/> Mining |
| <input checked="" type="checkbox"/> Finance, Insurance, and Real Estate | |

4. The name and address to which future correspondence should be addressed:

Community Financial Group
6901 W. Emerald St 201
BOISE, ID 83704

Submit Certificate of
Assumed Business
Name and \$20.00 fee to:

Secretary of State
700 West Jefferson
Basement West
PO Box 83720
Boise ID 83720-0080
208 334-2301

5. Name and address for this acknowledgment copy is (If other than # 4 above):

Phone number (optional):

208-376-7767

Signature: Kim Whiting

Printed Name: Kim Whiting

Capacity/Title: President

(see instruction # 8 on back of form)

Secretary of State use only

g:\compforms\idn form\idn form 05 Revised 01/2001

IDAHO SECRETARY OF STATE
04/25/2002 05:08
CK: 1261 CT: 159870 BH: 461597
1 @ 20.00 = 20.00 ASSUM NAME # 2

D54298

EXHIBIT D

EXHIBIT E

CANCELLATION OR AMENDMENT OF CERTIFICATE OF ASSUMED BUSINESS NAME

(Please type or print legibly)

FILED EFFECTIVE
10/25/2004 09:09

To the SECRETARY OF STATE, STATE OF IDAHO

Pursuant to Section 53-507 and 53-508, Idaho Code, the undersigned gives notice of the action(s) indicated below:

1. The assumed business name is: Community Financial Group
2. The assumed business name was filed with the Secretary of State's Office on 4-25-02 as file number D 54298.
3. ☐ Cancellation. The persons who filed the certificate no longer claim an interest in the above assumed business name and cancel the certificate in its entirety.
4. ☒ The assumed business name is amended to: Mortgage Concepts
5. ☐ The true names and business addresses of the entity or individuals doing business under the assumed business name are amended as follow:

| Add: | Delete: | Name: | Address: |
|--------------------------|--------------------------|-------|----------|
| <input type="checkbox"/> | <input type="checkbox"/> | _____ | _____ |
| <input type="checkbox"/> | <input type="checkbox"/> | _____ | _____ |
| <input type="checkbox"/> | <input type="checkbox"/> | _____ | _____ |

6. ☐ The type of business is amended to read:

| | | |
|--|--|--|
| <input type="checkbox"/> Retail Trade | <input type="checkbox"/> Manufacturing | <input type="checkbox"/> Transportation and Public Utilities |
| <input type="checkbox"/> Wholesale Trade | <input type="checkbox"/> Agriculture | <input type="checkbox"/> Finance, Insurance, and Real Estate |
| <input type="checkbox"/> Services | <input type="checkbox"/> Construction | <input type="checkbox"/> Mining |
7. ☐ The name and address to which future correspondence should be addressed is changed to read:

8. Name and address for this acknowledgment copy is:

Whiting & Co Mortgage Services
6901 W. Emerald St. Suite 204
Boise, ID 83704

Signature: Kim Whiting

Printed Name: Kim Whiting

Capacity: President

(see instruction # 9 on back of form)

Secretary of State use only

IDAHO SECRETARY OF STATE
 10/26/2004 05:00
 CK: CASH CT: 150010 BH: 773189
 1 @ 10.00 = 10.00 ASSUM AMEN # 2

D54298

g:\compforms\stateforms\amend.pmd
Revised 04/2003

EXHIBIT E

000081

EXHIBIT F



BrokerCheck Report

KIM ALMA WHITING

CRD# 1788454

Report #52527-85023, data current as of Friday, June 21, 2013.

| <u>Section Title</u> | <u>Page(s)</u> |
|-------------------------------------|-----------------------|
| Report Summary | 1 |
| Broker Qualifications | 2 - 3 |
| Registration and Employment History | 4 - 5 |
| Disclosure Events | 6 |

EXHIBIT F

000083

About BrokerCheck®

BrokerCheck offers information on all current and many former-FINRA-registered securities brokers, and all current and former FINRA-registered securities firms. FINRA strongly encourages investors to use BrokerCheck to check the background of securities brokers and brokerage firms before deciding to conduct, or continue to conduct, business with them.

- **What is Included in a BrokerCheck report?**

BrokerCheck reports for individual brokers include information such as employment history, professional qualifications, disciplinary actions, criminal convictions, civil judgments and arbitration awards. BrokerCheck reports for brokerage firms include information on a firm's profile, history, and operations, as well as many of the same disclosure events mentioned above.

Please note that the information contained in a BrokerCheck report may include pending actions or allegations that may be contested, *unresolved or unproven*. In the end, these actions or allegations may be resolved in favor of the broker or brokerage firm, or concluded through a negotiated settlement with no admission or finding of wrongdoing.

- **Where did this information come from?**

The information contained in BrokerCheck comes from FINRA's Central Registration Depository, or CRD® and is a combination of:

- o information FINRA and/or the Securities and Exchange Commission (SEC) require brokers and brokerage firms to submit as part of the registration and licensing process, and
- o information that regulators report regarding disciplinary actions or allegations against firms or brokers.

- **How current is this information?**

Generally, active brokerage firms and brokers are required to update their professional and disciplinary information in CRD within 30 days. Under most circumstances, information reported by brokerage firms, brokers and regulators is available in BrokerCheck the next business day.

- **What if I want to check the background of an investment adviser firm or investment adviser representative?**

To check the background of an investment adviser firm or representative, you can search for the firm or individual in BrokerCheck. If your search is successful, click on the link provided to view the available licensing and registration information in the SEC's Investment Adviser Public Disclosure (IAPD) website at <http://www.adviserinfo.sec.gov>. In the alternative, you may search the IAPD website directly or contact your state securities regulator at <http://www.nasaa.org>.

- **Are there other resources I can use to check the background of investment professionals?**

FINRA recommends that you learn as much as possible about an investment professional before deciding to work with them. Your state securities regulator can help you research brokers and investment adviser representatives doing business in your state.

Thank you for using FINRA BrokerCheck.



Using this site/information means that you accept the FINRA BrokerCheck Terms and Conditions. A complete list of Terms and Conditions can be found at

brokercheck.finra.org



For additional information about the contents of this report, please refer to the User Guidance or www.finra.org/brokercheck. It provides a glossary of terms and a list of frequently asked questions, as well as additional resources.

For more information about FINRA, visit www.finra.org.

KIM A. WHITING**CRD# 1788454**

This broker is not currently registered with FINRA.

Report Summary for this Broker

This report summary provides an overview of the broker's professional background and conduct. Additional information can be found in the detailed report.

Broker Qualifications

This broker is not currently registered with FINRA.

This broker has passed:

- 1 Principal/Supervisory Exam
- 1 General Industry/Product Exam
- 1 State Securities Law Exam

Registration History

This broker was previously registered with FINRA at the following brokerage firms:

FIRST ALLIED SECURITIES, INC.

CRD# 32444
WAILUKU, HI
07/2008 - 01/2012

WORLD GROUP SECURITIES, INC.

CRD# 114473
BOISE, ID
04/2002 - 07/2008

WMA SECURITIES, INC.

CRD# 32625
DULUTH, GA
06/1994 - 04/2002

Disclosure Events

Disclosure events are certain criminal matters; regulatory actions; civil judicial proceedings; customer complaints, arbitrations, or civil litigations; employment terminations; and financial matters in which the broker has been involved.

Are there events disclosed about this broker? **Yes**

The following types of disclosures have been reported:

| Type | Count |
|------------------|-------|
| Regulatory Event | 1 |
| Judgment/Lien | 1 |

Broker Qualifications



Registrations

This section provides the self-regulatory organizations (SROs) and U.S. states/territories the broker is currently registered and licensed with, the category of each registration, and the date on which the registration became effective. This section also provides, for every brokerage firm with which the broker is currently employed, the address of each branch where the broker works.

This broker is not currently registered with FINRA.

Broker Qualifications



Industry Exams this Broker has Passed

This section includes all securities industry exams that the broker has passed. Under limited circumstances, a broker may attain a registration after receiving an exam waiver based on exams the broker has passed and/or qualifying work experience. Any exam waivers that the broker has received are not included below.

This individual has passed 1 principal/supervisory exam, 1 general industry/product exam, and 1 state securities law exam.

Principal/Supervisory Exams

| Exam | Category | Date |
|--|-----------|------------|
| Investment Company Products/Variable Contracts Principal Examination | Series 26 | 04/28/2004 |

General Industry/Product Exams

| Exam | Category | Date |
|---|----------|------------|
| Investment Company Products/Variable Contracts Representative Examination | Series 6 | 04/25/1988 |

State Securities Law Exams

| Exam | Category | Date |
|--|-----------|------------|
| Uniform Securities Agent State Law Examination | Series 63 | 04/25/1988 |

Additional information about the above exams or other exams FINRA administers to brokers and other securities professionals can be found at www.finra.org/brokerqualifications/registeredrep/.

Registration and Employment History



Registration History

This broker previously was registered with FINRA at the following firms:

| Registration Dates | Firm Name | CRD# | Branch Location |
|--------------------|--|--------|--------------------|
| 07/2008 - 01/2012 | FIRST ALLIED SECURITIES, INC. | 32444 | WAILUKU, HI |
| 04/2002 - 07/2008 | WORLD GROUP SECURITIES, INC. | 114473 | BOISE, ID |
| 06/1994 - 04/2002 | WMA SECURITIES, INC. | 32625 | DULUTH, GA |
| 02/1992 - 06/1994 | INTERSECURITIES, INC. | 16164 | ST. PETERSBURG, FL |
| 04/1988 - 02/1992 | FIRST AMERICAN NATIONAL SECURITIES, INC. | 10111 | DULUTH, GA |

Employment History

Below is the broker's employment history for up to the last 10 years.

Please note that the broker is required to provide this information only while registered with FINRA and the information is not updated after the broker ceases to be registered. Therefore, an employment end date of "Present" may not reflect the broker's current employment status.

| Employment Dates | Employer Name | Employer Location |
|-------------------|-------------------------------|-------------------|
| 07/2008 - Present | ASSURANT HEALTH | EAGLE, ID |
| 07/2008 - Present | FIRST ALLIED SECURITIES, INC. | SAN DIEGO, CA |
| 12/2006 - Present | NOTARY PUBLIC | BOISE, ID |
| 10/2006 - Present | WHITING AND CO INC | BOISE, ID |
| 04/2003 - Present | MAUI RENTAL | MAUI, HI |
| 10/2003 - 07/2008 | BLUE SHIELD | BOISE, ID |
| 07/2003 - 07/2008 | JOHN ALDEN LIFE | BOISE, ID |
| 04/2002 - 07/2008 | WORLD GROUP SECURITIES, INC. | BOISE, ID |
| 06/2001 - 07/2008 | WFG | BOISE, ID |
| 11/2004 - 06/2006 | MORTGAGE CONCEPTS | BOISE, ID |
| 06/2002 - 06/2006 | AFFILIATE BROKER PROGRAM | DULUTH, GA |
| 05/2002 - 11/2004 | COMMUNITY FINANCIAL GROUP | BOISE, ID |

Registration and Employment History



Other Business Activities

This section includes information, if any, as provided by the broker regarding other business activities the broker is currently engaged in either as a proprietor, partner, officer, director, employee, trustee, agent or otherwise. This section does not include non-investment related activity that is exclusively charitable, civic, religious or fraternal and is recognized as tax exempt.

- 1.) PEAK PERFORMANCE, LLC; DIRECT OWNER; HOLDING COMPANY OR SUB-S CORP; START DATE: 10/26/2010
 - 2.) ROY AND BIRDIE WHITING LIVING TRUST; CO-SUCCESSOR TRUSTEE; TRUSTEE OR OTHER FIDUCIARY POSITION ; START DATE: 3/4/1997
 3. EAGLE RENTAL; OWNER; REAL ESTATE(RENTAL PROPERTY/PASSIVE INVESTMENT); START DATE 08/08/2011; 4 HOURS PER MONTH.
-

Disclosure Events



What you should know about reported disclosure events:

1. Disclosure events are certain criminal matters; regulatory actions; civil judicial proceedings; customer complaints, arbitrations, or civil litigations; employment terminations; and financial matters in which the broker has been involved.
2. **Certain thresholds must be met before an event is reported to CRD, for example:**
 - o A law enforcement agency must file formal charges before a broker is required to report a particular criminal event.
 - o A customer dispute must involve allegations that a broker engaged in activity that violates certain rules or conduct governing the industry and that the activity resulted in damages of at least \$5,000.
3. **Disclosure events in BrokerCheck reports come from different sources:**
 - o As mentioned at the beginning of this report, information contained in BrokerCheck comes from brokers, brokerage firms and regulators. When more than one of these sources reports information for the same disclosure event, all versions of the event will appear in the BrokerCheck report. The different versions will be separated by a solid line with the reporting source labeled.
4. **There are different statuses and dispositions for disclosure events:**
 - o A disclosure event may have a status of *pending*, *on appeal*, or *final*.
 - A "pending" disclosure event involves allegations that have not been proven or formally adjudicated.
 - A disclosure event that is "on appeal" involves allegations that have been adjudicated but are currently being appealed.
 - A "final" disclosure event has been concluded and its resolution is not subject to change.
 - o A final disclosure event generally has a disposition of *adjudicated*, *settled* or *otherwise resolved*.
 - An "adjudicated" matter includes a disposition by (1) a court of law in a criminal or civil matter, or (2) an administrative panel in an action brought by a regulator that is contested by the party charged with some alleged wrongdoing.
 - A "settled" matter generally represents a disposition wherein the parties involved in a dispute reach an agreement to resolve the matter. Please note that brokers and brokerage firms may choose to settle customer disputes or regulatory matters for business or other reasons.
 - A "resolved" matter usually includes a disposition wherein no payment is made to the customer or there is no finding of wrongdoing on the part of the individual broker. Such matters generally involve customer disputes.

For your convenience, below is a matrix of the number and status of disclosure events involving this broker. Further information regarding these disclosure events can be found in the subsequent pages of this report. You also may wish to contact the broker to obtain further information regarding the disclosure events.



| | Pending | Final | On Appeal |
|------------------|---------|-------|-----------|
| Regulatory Event | 0 | 1 | 0 |
| Judgment/Lien | N/A | 1 | N/A |



Disclosure Event Details

When evaluating this information, please keep in mind that a disclosure event may be pending or involve allegations that are contested and have not been resolved or proven. The disclosure event may, in the end, be withdrawn, dismissed, resolved in favor of the broker, or concluded through a negotiated settlement for certain business reasons (e.g., to maintain customer relationships or to limit the litigation costs associated with disputing the allegations) with no admission or finding of wrongdoing.

This report provides the information exactly as it was reported to CRD and therefore some of the specific data fields contained in the report may be blank if the information was not provided to CRD.

Regulatory - Final

This type of disclosure event may involve (1) a final, formal proceeding initiated by a regulatory authority (e.g., a state securities agency, self-regulatory organization, federal regulatory such as the Securities and Exchange Commission, foreign financial regulatory body) for a violation of investment-related rules or regulations; or (2) a revocation or suspension of a broker's authority to act as an attorney, accountant, or federal contractor.

Disclosure 1 of 1

| | |
|--|---|
| Reporting Source: | Regulator |
| Regulatory Action Initiated By: | IDAHO DEPARTMENT OF FINANCE |
| Sanction(s) Sought: | Other |
| Other Sanction(s) Sought: | RETAKE AND PASS THE SERIES 26 EXAMINATION. |
| Date Initiated: | 01/22/2004 |
| Docket/Case Number: | 2003-7-39 |
| Employing firm when activity occurred which led to the regulatory action: | WORLD GROUP SECURITIES, INC. |
| Product Type: | Investment Contract(s) |
| Other Product Type(s): | |
| Allegations: | RESPONDENT WHITING NEITHER ADMITS NOR DENIES THE DEPARTMENT'S FINDINGS AND CONCLUSIONS RELATING TO ALLEGED FAILURE TO: 1)REPORT OUTSIDE BUSINESS ACTIVITIES, 2) EXERCISE DILIGENT SUPERVISION OVER SALESMEN, 3) ENFORCE COMPANY PROCEDURES. |
| Current Status: | Final |



Resolution: Order

Does the order constitute a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct? Yes

Resolution Date: 01/22/2004

Sanctions Ordered:

Other Sanctions Ordered: WHITING AGREES TO PASS THE SERIES 26 EXAMINATION WITHIN 90 DAYS OF THE DATE OF THIS AGREEMENT AND ORDER AS A CONDITION TO RETENTION OF HIS OSJ AND BOM ROLES AND SUPERVISORY RESPONSIBILITIES AT WORLD GROUP SECURITIES, INC.

Sanction Details: WHITING AGREES TO PASS THE SERIES 26 EXAMINATION WITHIN 90 DAYS OF THE DATE OF THIS AGREEMENT AND ORDER AS A CONDITION TO RETENTION OF HIS OSJ AND BOM ROLES AND SUPERVISORY RESPONSIBILITIES AT WORLD GROUP SECURITIES, INC.

Reporting Source: Broker

Regulatory Action Initiated By: STATE OF IDAHO, DEPARTMENT OF FINANCE

Sanction(s) Sought: Undertaking

Date Initiated: 06/06/2003

Docket/Case Number: 2003-7-39

Employing firm when activity occurred which led to the regulatory action: WORLD GROUP SECURITIES, INC.

Product Type: No Product

Allegations: ALLEGED VIOLATION OF RULE 80, 119.01, 199.03 AND 124 OF THE IDAHO SECURITIES ACT. REPRESENTATIVE NEITHER ADMITS NOR DENIES THE STATE OF ID, DEPT OF FINANCE'S FINDINGS AND CONCLUSIONS RELATING TO ALLEGED FAILURE TO 1) REPORT OUTSIDE BUSINESS ACTIVITIES, 2) EXERCISE DILIGENT SUPERVISION OVER REPRESENTATIVES UNDER HIS SUPERVISION, 3) ENFORCE COMPANY PROCEDURES, RESULTING IN TECHNICAL VIOLATIONS OF PROCEDURES.



| | |
|---|--|
| Current Status: | Final |
| Resolution: | Order |
| Does the order constitute a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct? | No |
| Resolution Date: | 01/29/2004 |
| Sanctions Ordered: | Other: REPRESENTATIVE AGREES TO RETAKE THE SERIES 26 EXAMINATION WITHIN NINETY DAYS AS A CONDITION TO RETENTION OF HIS SUPERVISORY RESPONSIBILITIES. |



Judgment/Lien

This type of disclosure event involves an unsatisfied and outstanding judgments or liens against the broker.

Disclosure 1 of 1

| | |
|-----------------------------------|---------------------------------|
| Reporting Source: | Broker |
| Judgment/Lien Holder: | AMERICAN EXPRESS CENTURION BANK |
| Judgment/Lien Amount: | \$51,818.64 |
| Judgment/Lien Type: | Civil |
| Date Filed: | 04/28/2011 |
| Type of Court: | DISTRICT |
| Name of Court: | THE FORTH JUDICIAL DISTRICT |
| Location of Court: | ADA COUNTY, ID |
| Docket/Case #: | CV OC 10 22665 |
| Judgment/Lien Outstanding? | Yes |

End of Report



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NO. _____
A.M. _____ FILED P.M. 4

JUL 12 2013

CHRISTOPHER D. RICH, Clerk
By STEPHANIE VIDAK
DEPUTY

J. D. Merris
MERRIS & NAUGLE, PLLC
913 West River Street, Suite 420
Boise, ID 83702
Phone: (208) 336-2060
Facsimile: (208) 336-2059
ISB # 2386

Attorney for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BILL GAILEY,

Plaintiff,

vs.

KIM WHITING,

Defendant

Case No. CV OC 2013-05171


**AFFIDAVIT OF J. D. MERRIS IN
RESPONSE TO PLAINTIFF'S
OPPOSITION TO MOTION TO DISMISS**

State of Idaho)
) ss.
County of Ada)

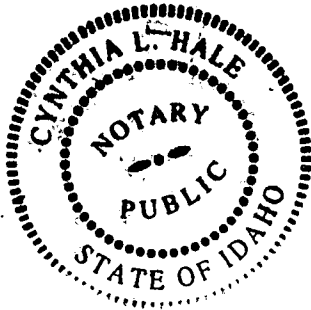
J. D. Merris, upon oath, testifies and states as follows:


1. That I am attorney of record for Defendant Kim Whiting;
2. That in my capacity as the attorney for Defendant Whiting in this proceeding, I have personal knowledge of those matters set forth in this affidavit;
3. That attached to this Affidavit is a true and correct copy of the Certificate of Withdrawal of World Group Securities, Inc. on file in the records of the Idaho Secretary of State marked as Exhibit A.
4. Further your Affiant sayeth not.

DATED this 12th day of July, 2013.


J. D. Merris

Subscribed and sworn before me this 12th day of July, 2013.




Notary Public for the State of Idaho
My commission expires on 12/14/2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of July, 2013, I caused to be served a true and correct copy of the foregoing document as follows:

TO:

Martin J. Martelle
Sarah Bratton
MARTELLE, BRATTTON & ASSOC. P.A.
873 East State Street
Eagle, ID 83616

VIA:

____ Hand Delivery
____ Federal Express
____ Certified Mail
☒ U.S. Mail
☒ Facsimile Transmission


J. D. MERRIS

State of Idaho

Office of the Secretary of State

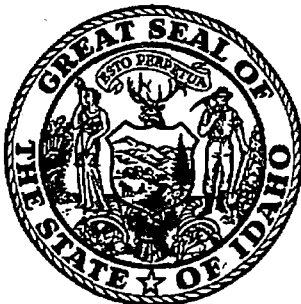
**CERTIFICATE OF WITHDRAWAL
OF
WORLD GROUP SECURITIES, INC.**

File Number C 141191

I, BEN YSURSA, Secretary of State of the State of Idaho, hereby certify that Application for Certificate of Withdrawal from this State, has been received in this office and is found to conform to law.

ACCORDINGLY and by virtue of the authority vested in me by law, I issue this Certificate of Withdrawal and attach hereto a duplicate of the Application for such Certificate.

Dated: March 26, 2012



Ben Yursa

SECRETARY OF STATE

By

Donna Hestness

Exhibit A

000099



APPLICATION FOR CERTIFICATE OF WITHDRAWAL

(Instructions on back of application)

2012 MAR 26 AM 9:20
SECRETARY OF STATE
STATE OF IDAHO

To the Secretary of State of Idaho

Pursuant to Section 30-1-1520, Idaho Code, the undersigned Corporation hereby applies for a certificate of withdrawal from the State of Idaho, and for that purpose submits the following statement:

1. The name of the corporation is:

World Group Securities, Inc. - ID: C141191

The name which it used in Idaho is:

World Group Securities, Inc.

2. It is incorporated under the laws of Delaware

3. It is not transacting business in the State of Idaho.

4. It hereby surrenders its authority to transact business in said state.

5. It revokes the authority of its registered agent in the State of Idaho to accept service of process and consents that service of process in any action, suit or proceeding based upon any cause of action arising in the State of Idaho during the time it was authorized to transact business therein may thereafter be made on it by registered or certified mail to the corporation at the address listed in item 6., below.

6. The post office address to which process against the corporation may be mailed is:

570 Carillon Pkwy., St. Petersburg, FL 33716

7. It agrees to notify the Secretary of State of the State of Idaho of any change to the address in Item 6.

Signature

Typed Name Seth D. Miller

Capacity President

Customer Acct # :

(if using pre-paid account)

Secretary of State use only

g:\c:\formal\corpform\1
certofwithdrawal_corp.pdf
Revised 07/2002

IDAHO SECRETARY OF STATE
03/27/2012 05:00
CK: 324264 CT: 268564 BH: 1316942
1 @ 20.00 = 20.00 FOR WITHDR # 2

C141191

Exhibit A

000100

JUL 12 2013

CHRISTOPHER D. RICH, Clerk
By STEPHANIE VIDAK
DEPUTY

J. D. Merris
MERRIS & NAUGLE, PLLC
 913 West River Street, Suite 420
 Boise, ID 83702
 Phone: (208) 336-2060
 Facsimile: (208) 336-2059
 ISB # 2386

Attorney for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BILL GAILEY,

Plaintiff,

VS.

KIM WHITING,

Defendant

Case No. CV OC 2013-05171

**DEFENDANT'S REPLY MEMORANDUM
TO PLAINTIFF'S OPPOSITION TO
MOTION TO DISMISS**

GENERAL PERSONAL JURISDICTION

Plaintiff's argument in opposition to Defendant's Motion to Dismiss appears to have confused general personal jurisdiction and specific personal jurisdiction. Plaintiff's opposition suggests that the long period of time that Defendant Whiting conducted business in Idaho somehow subjects him to continuing personal jurisdiction of the Idaho courts after he has moved out of state. However, the basis for general personal jurisdiction is not the length of time that one was inside the borders of the state.

General personal jurisdiction was addressed in *Jonasson v. Gibson*, 108 Idaho 459, 700

P.2d 81 (Ct. App. 1985) at 462 / 84:

Our analysis of the merits of the issue involves a two-step process. We must determine the basis of jurisdiction and, then, the sufficiency of process. "A court cannot exercise personal jurisdiction over a party unless a proper basis exists. Basis refers to the relationship between the party and the territory of the state from which the court's authority derives." R. CASAD, JURISDICTION IN CIVIL ACTIONS p 1.01(2)(a) (1983) (hereinafter "Casad, Jurisdiction"). Consent is not now, nor has it ever been, the sole basis of personal jurisdiction. In addition to consent, there are two other traditional bases of jurisdiction--presence and domicile. *Id.* at

000101

p 2.02(1)(a)(i); see also *Pennoyer v. Neff*, 5 Otto 714, 720, 95 U.S. 714, 720, 24 L.Ed. 565 (1878). Under the theory of jurisdiction enunciated in *Pennoyer*, the defendant's "physical connection to the state by virtue of his residence is an adequate basis for personal jurisdiction." *Casad*, Jurisdiction p 2.02(2)(b)(i). Although the theory of jurisdiction has changed somewhat since *Pennoyer*, residence is still an adequate basis. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 27 (1971). The basis of the trial court's exercise of personal jurisdiction over Gibson was his residence in this state.

The second step in our analysis involves the process by which the court obtains jurisdiction over a party. Under early English common law this was often done by a writ *capias ad respondendum* or civil arrest. Under such a writ, the party sued was taken into custody to assure his appearance before the court. This practice never caught on in the United States. Instead, "service of process" was the means by which the defendant was brought, legally if not physically, before the court. The manner of service is constrained by due process considerations. However, personal service of a defendant within the borders of the state of his residence is always sufficient to invoke the jurisdiction of a court of that state. See *Casad*, Jurisdiction p 2.03 at 2-29. Gibson was personally served, thus he was legally before the court. See I.R.C.P. 4(d)(2). The two-prongs having been satisfied, the trial court had personal jurisdiction over Gibson.

The *Jonasson* court did not discuss the Idaho long-arm statute because the statute was not an issue in the case, but the case implies that general personal jurisdiction is based on: 1) consent of the defendant, 2) defendant's presence in the state when served, or 3) domicile of the defendant. In the present case, Defendant Whiting has not consented to the jurisdiction of the Idaho courts; Defendant Whiting was not present in the Idaho when Plaintiff allegedly was the victim of a tort or when Defendant was served with process in this matter, and Defendant Whiting was not domiciled in Idaho when Plaintiff allegedly was the victim of Defendant Whiting's negligence. See Defendant Whiting's Affidavit in Response to Plaintiff's Opposition to Motion to Dismiss, ¶¶ 3, 6 and 7. (See generally, *Kirkpatrick v. Transtector Systems*, 114 Idaho 559, 759 P.2d 65 (1988) at 562 / 68 which states "For a change of domicile to occur, the fact of physical presence at a dwelling place and the intention to make it a

home must concur.”) Therefore, general personal jurisdiction over Defendant Whiting is not applicable in this case. Plaintiff’s arguments in much of his opposition imply otherwise.

Plaintiff’s opposition also suggests that Defendant Whiting was associated with K & J Whiting LLC, which subsequently changed names to Peak Performance LLC before being dissolved in 2012.

Houghland Farms, Inc. v. Johnson, 119 Idaho 72, 75, 803 P.2d 978, 981 (1990)

indicates :

In analyzing whether there are sufficient contacts for the exercise of specific personal jurisdiction, we must remember that the suit for which jurisdiction is sought must arise out of or relate to the defendant’s contacts with Idaho. It is not just any contacts by the defendant with Idaho that will sustain the exercise of specific personal jurisdiction, but only those out of which the suit arises or those that relate to the suit.

Plaintiff’s cause of action does not involve any allegations associated with these LLCs.

SPECIFIC PERSONAL JURISDICTION

Plaintiff’s Complaint and his arguments opposing the Motion to Dismiss rely expressly on the Idaho long-arm statute as a basis for jurisdiction of the Idaho courts for his cause of action. Note that purpose of the long-arm statute is to provide the citizens of Idaho an Idaho forum to resolve claims against non-residents. Hougland, supra. The language of the statute does not expressly exclude non-residents such as Plaintiff from relying on it; however, the Court should closely examine his claim to determine if statute applies and then, if it does apply to his claim, reexamine his claim to see if the due process analysis in addition to the long-arm analysis supports the jurisdiction of the Idaho courts.

The present cause of action is based on the details of a telephone call placed in Oregon by Plaintiff to Defendant Whiting to Defendant's cell phone, with a 208 prefix, in Hawaii. See Gailey's Affidavit in Opposition, ¶14, Exhibit E. Defendant Whiting was a resident of Hawaii and no longer licensed as an insurance agent in Idaho at the time of the calls. Whiting's Affidavit in Response to Opposition, ¶¶ 3, 6 and 7.

Plaintiff's Complaint is titled "Negligence Complaint for Damages". Clearly, Plaintiff is alleging a cause of action in tort. Defendant argued in his original Memorandum in Support of Motion to Dismiss for Lack of Personal Jurisdiction that I.C. §5-514(b) does not apply in this matter because no part of the Complaint's alleged tortious conduct took place in Idaho. Additionally, under the Due Process Clause of the U. S. Constitution, a prime focus of the personal jurisdictional analysis regarding an action in tort is the jurisdiction where the alleged injury occurred. See, Calder v. Jones, 465 U.S. 783, (1984).

ATTENUATED CONTACTS AND THE INTERNET'S HEARSAY

Gailey's Affidavit in Opposition, ¶14 a. states that a website indicated that World Group Securities, Inc., as of April 24, 2013, is active at an address in Boise, Idaho. However, World Group Securities, Inc. surrendered its authority to conduct business in Idaho to the Idaho Secretary of State on March 26, 2012. See Affidavit of J. D. Merris in Response to Plaintiff's Opposition, ¶ 3, Exhibit A.


Gailey's Affidavit in Opposition in ¶¶14b. and 14c. states that websites indicate that Mortgage Concepts and/or Community Financial Group and Whiting & Co. Mortgage Services, Inc., as of April 24, 2013, were active at an address in Boise, Idaho. However, these entities were effectively dissolved July 6, 2009. See Whiting's Affidavit in Response to Opposition, ¶¶ 8 and 9.

Gailey's Affidavit in Opposition, ¶15a. states that the web site of the Financial Authority (sic) Regulatory Authority (should be Financial Industry Regulatory Authority, aka FINRA) identified two actions of the Idaho Department of Finance that sought sanctions against Defendant. Plaintiff then attached only a portion of the FINRA report. This information indicated an early 2011 Idaho judgment entered against Defendant. This information is not relevant to personal jurisdiction over Defendant in this case. The FINRA report also described an Idaho Department of Finance enforcement action against Defendant finalized in January 2004. This information also is not relevant to personal jurisdiction over Defendant in this case. However, the entire FINRA report from the website indicates a measure of Defendant's business connections with Hawaii. See Whiting's Affidavit in Response to Opposition, ¶10.

CONCLUSION

An Oregon resident is bringing a tort action against a resident of Hawaii in this Idaho District Court case. Plaintiff is confusing general personal jurisdiction with specific personal jurisdiction when he argues that Defendant's previous business activities in Idaho are a basis for personal jurisdiction over Defendant in this matter. Defendant Whiting moved his domicile to Hawaii before any of the alleged acts of negligence took place. Plaintiff had not been in touch with Defendant for over three years when Plaintiff initiated a phone call to Defendant (see, Complaint, ¶9). Plaintiff has not cited any case law that supports his arguments, because there simply isn't any. There is no personal jurisdiction by estoppel. This case should be dismissed for lack of personal jurisdiction over Defendant Whiting.

DATED this 12th day of July, 2013



J.D. MERRIS
Attorney for Defendant

000105

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of July, 2013, I caused to be served a true and correct copy of the foregoing document as follows:

TO:

Martin J. Martelle
Sarah Bratton
MARTELLE, BRATTTON & ASSOC. P.A.
873 East State Street
Eagle, ID 83616

VIA:

☐ Hand Delivery
☐ Federal Express
☐ Certified Mail
☒ U.S. Mail
☒ Facsimile Transmission



J. D. MERRIS

NO. _____
A.M. _____ P.M. _____

CHRISTOPHER D. RICH, Clerk
By STEPHANIE VIDAK
DEPUTY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of July, 2013, I caused to be served a true and correct copy of the foregoing document as follows:

TO:

Martin J. Martelle
Sarah Bratton
MARTELLE, BRATTTON & ASSOC. P.A.
873 East State Street
Eagle, ID 83616

VIA:

☐ Hand Delivery
☐ Federal Express
☐ Certified Mail
☒ U.S. Mail
☒ Facsimile Transmission



J. D. MERRIS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July, 2013, I caused to be served a true and correct copy of the foregoing document as follows:

TO:

Martin J. Martelle
Sarah Bratton
MARTELLE, BRATTTON & ASSOC. P.A.
873 East State Street
Eagle, ID 83616

VIA:

☐ Hand Delivery
☐ Federal Express
☐ Certified Mail
☒ U.S. Mail
☒ Facsimile Transmission



J. D. MERRIS

RECEIVED

AUG 27 2013

ADA County Clerk
MARTELLE, BRATTON, and ASSOCIATES, P.A.

Martin J. Martelle ISB No. 3304

Sarah B. Bratton ISB No. 7771

873 East State Street

Eagle, ID 83616

Telephone: (208) 938-8500

Facsimile: (208) 938-8503

E-mail: attorney@martellelaw.com

Attorney for Plaintiff

ORIGINAL

NO. 84 FILED
A.M. 8:45 P.M.

AUG 27 2013

CHRISTOPHER D. RICH, Clerk
By JAMIE MARTIN
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BILL GAILEY

Plaintiff,

vs.

KIM WHITING

Defendant.

Case No. CV OC 2013-05171

**SECOND AFFIDAVIT OF BILL GAILEY
OPPOSING DEFENDANT'S MOTION TO
DISMISS FOR LACK OF PERSONAL
JURISDICTION**

STATE OF IDAHO)

: ss.

County of Ada)

COMES NOW, Bill Gailey (hereafter referred to as Affiant), being first duly sworn upon oath, thereafter deposes and says:

1. That I am the Plaintiff in the above entitled action;
2. That I am a citizen of resident of the State of Oregon;
3. That Mr. Whiting has, from 1994 to 2011, been listed as the registered representative of Western Reserve Life Assurance;
4. That between 1994 and 2011, Mr. Whiting assisted me in all matters related to my life insurance policy with Western Reserve Life Assurance;

SECOND AFFIDAVIT OF BILL GAILEY

1

000111

5. That in 1999, after contemplating taking a loan from my life insurance policy, I asked Mr. Whiting for materials, forms, and paper work related to taking a loan from a Western Reserve Life Assurance life insurance policy;

6. That in 1999, after seeking the materials named in paragraph 6, received from Mr. Whiting information concerning taking a loan from my life insurance policy;

7. That on April 7, 1999, subsequent to receiving materials from Mr. Whiting concerning taking a loan from my life insurance policy, I submitted a request for a loan on my Western Reserve Life Assurance life insurance policy.

Further affiant sayeth not.

DATED this 21 day of August, 2013.

Bill Gailey
Bill Gailey

State of Idaho
County of Ada

Sworn to and subscribed before me on the 21st day of August,
2013, by Bill Gailey

(Personalized Seal)



Jennie L. Finch
Notary Public's Signature

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day, August 26, 2013, I mailed the foregoing SECOND AFFIDAVIT OF BILL GAILEY OPPOSING DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION to the following recipients via USPS Mail and Facsimile:

J.D. Merris
Merris & Naugle, PLLC
913 West River Street, Suite 420
Boise, ID 83702

MARTELLE, BRATTON & ASSOCIATES, PA.

A handwritten signature in black ink, appearing to read 'Nathan Nielson', is written over a horizontal line.

Nathan Nielson
Legal Assistant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

OCT 07 2013

CHRISTOPHER D. RICH, Clerk
By DIANE CATLAN
Esq.

| | | |
|--------------|---|-------------------------------|
| BILL GAILEY, |) | |
| |) | Case No. CV-OC-2013-05171 |
| Plaintiff, |) | |
| |) | ORDER GRANTING DEFENDANT'S |
| vs. |) | MOTION TO DISMISS FOR LACK OF |
| |) | PERSONAL JURISDICTION |
| KIM WHITING, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

Presently before the Court is defendant Kim Whiting's Motion to Dismiss for Lack of Personal Jurisdiction pursuant to Rule 12(b)(2) of the Idaho Rules of Civil Procedure, filed on May 1, 2013. A hearing was held on the motion on September 6, 2013, at which both parties appeared and presented oral argument to the Court to supplement the briefing and affidavits filed in regards to the motion. The Court, having considered the arguments and evidence submitted by both counsel, now enters the following memorandum decision and order granting the defendant's motion to dismiss and finding that it cannot take personal ~~personal~~ jurisdiction over the defendant under Idaho's long-arm statute, section 5-514, Idaho Code, or under the Due Process clause of the Fourteenth Amendment to the United States Constitution.

I. BACKGROUND

This is an action for professional negligence in relation to a contract of life insurance originally purchased by plaintiff Bill Gailey from defendant Kim Whiting on May 2, 1994, in Ada County, Idaho. Defendant Kim Whiting acted as the agent for the insurer in the subject transaction. The alleged negligence consisted of Whiting's advice to Gailey in August 2011 to "surrender the policy and request cash out of the remainder of the cash value" of the policy.

Complaint at ¶ 12. After Gailey took the advice and cashed out the policy, he suffered negative tax consequences which he lays at the feet of Whiting on the basis that Whiting had a professional duty to warn him concerning tax matters, but failed to do so.

In his motion to dismiss, Whiting argues that the Court lacks personal jurisdiction over him under Idaho's long-arm statute (I.C. § 5-514) and the United States Constitution because the undisputed fact is that when the allegedly actionable advice was given in August 2011, Whiting was a resident of Hawaii, and Gailey was a resident of Oregon, and the allegedly negligent advice was given over the phone while the parties were physically present in those states. Thus, if any tort was committed, Whiting argues it was committed outside this state's borders by non-residents, and therefore none of the provisions of section 5-514 apply. For his due process argument, Whiting contends that the passage of years following the sale of the policy in Idaho, and the fact that the conduct at issue involves an alleged tort distinct from the commercial transaction in which the policy was sold, has so attenuated the link between himself and the state of Idaho as to render this Court's assertion of personal jurisdiction over him unconstitutional.

For his part, Gailey argues that both section 5-514 and the U.S. Constitution are satisfied by virtue of the undisputed fact that Whiting brokered the sale of the underlying insurance contract in Idaho in 1994. He further points out that Whiting maintained one or more businesses in the state until around 2012 and that when he called Whiting in August 2011 for advice, he reasonably believed, based upon the area code of Mr. Whiting's phone number, that Mr. Whiting was still residing in Idaho. Therefore, Gailey urges this court to treat the tortious act as having occurred in Idaho notwithstanding that the advice was given from Hawaii and received in Oregon.

II. LEGAL STANDARDS

As the parties correctly recognize, in Idaho courts personal jurisdiction over non-residents is assessed on two levels: first, whether there is a statutory basis for jurisdiction under section 5-514, Idaho Code, and second, whether the assertion of personal jurisdiction comports with the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 726, 152 P.3d 594, 597 (2007). In the context of a motion to dismiss for lack of personal jurisdiction, the non-moving party is entitled to “all reasonable inferences which can be drawn from the facts presented” and to have such facts construed by the court in the light most favorable to it. *W. States Equip. Co. v. Am. Amex, Inc.*, 125 Idaho 155, 157, 868 P.2d 483, 485 (1994).

A. IDAHO’S LONG-ARM STATUTE. Section 5-514, Idaho Code, provides a statutory basis for *specific* personal jurisdiction over nonresidents. *Id.* at 158, 868 P.2d at 486. In practice, this means that “[n]ot just any contacts with Idaho will suffice to sustain the exercise of jurisdiction [rather] the ensuing litigation must arise out of or relate to the contacts” at issue in the suit. *Id.*; I.C. § 5-514 (“Any person . . . whether or not a citizen or resident of this state, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person . . . to the jurisdiction of the courts of this state **as to any cause of action arising from the doing of any of said acts**” (emphasis added.)) Section 5-514 is “remedial legislation designed to provide a forum for Idaho residents and should be liberally construed to effectuate that purpose.” *Blimka* at 726, 152 P.3d at 597.

B. DUE PROCESS REQUIREMENTS. For a state court’s exercise of personal jurisdiction over a non-resident to comply with the requirements of due process, the defendant must have “certain minimum contacts with the state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Id.* at 727, 152 P.3d at 598

(citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 101–02 (1945)) (internal quotation marks omitted). This assessment requires the Court to consider the interplay between the defendant, the forum, and the litigation. *Id.* The term “minimum contacts” has been described by the United States Supreme Court as encompassing “some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283, 1298 (1958). Because it is foreseeable that one who “purposefully avails” himself of these benefits and protections may be called to account for the consequences of his behavior arising from such availment in the state which furnished the benefits, due process is presumptively not offended when that state’s courts assert personal jurisdiction over such a defendant. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S. Ct. 2174, 2184, 85 L. Ed. 2d 528 (1985).

III. ANALYSIS

The Court begins by noting that the procedural posture of this motion is one for dismissal under Rule 12 of the Idaho Rules of Civil Procedure rather than one for summary judgment under Rule 56. Accordingly, plaintiff Gailey, as the non-moving party, is entitled to the presumptions set forth above in section II with respect to the facts presented in the complaint and in the affidavits submitted by the parties.

Further, the Court notes that the complaint contains only a single claim for negligence, although the bases for personal jurisdiction cited therein are those typically associated with actions arising in both contract (I.C. § 5-514(a)) and tort (I.C. § 5-514(b)). Section 5-514(a), read in tandem with the preamble, states that the courts of this state have personal jurisdiction over any person who “transact[s] any business within this state which is . . . defined as the doing of

any act for the purpose of realizing pecuniary benefit or accomplishing or attempting to accomplish, transact or enhance the business purpose or objective or any part thereof of such person” provided the cause of action *arose from* the transaction of such business. Section 5-514(b), read in tandem with the preamble, states that the courts of this state have personal jurisdiction over any person who “commi[ts] . . . a tortious act within this state” provided the cause of action arose from the tortious act.

The defendant emphasizes the fact that the complaint states only one cause of action, residing in tort, and appears to argue that because the plaintiff is not taking issue with the defendant’s performance of his contractual obligations as they arose when the policy was sold in 1994, the Court should look exclusively to section 5-514(b), and dismiss the case because the tort and resulting injury occurred, if at all, in Oregon rather than in Idaho, as that subsection requires. Assuming that to form at least a part of the defendant’s argument, the Court has not found any published decisions issued in this state holding that if a plaintiff asserts only a cause of action for negligence, he cannot base personal jurisdiction over the defendant on section 5-514(a), but must rely instead upon section 5-514(b). Clearly, a great many torts have one or more commercial transactions as factual antecedents, and one of the jobs of the Court in this case will be to determine whether the tort “[arose] from the doing of” said business or whether, instead, the tort is so distinct from the business transaction that section 5-514(a) cannot be applied under the standards articulated above.

Before turning to the problem at hand, the Court also pauses to note the somewhat unusual residency status of the plaintiff in this case. There is no dispute that at the time the alleged tort was committed, the plaintiff was a resident of Oregon, not Idaho. The plaintiff has not claimed that Oregon state courts could not assert jurisdiction over the defendant, and the

defendant himself has taken the position that this suit belongs in Oregon. Ordinarily, absent special circumstances, it is fair to state that most plaintiffs in such a position would prefer to litigate in their own state's court. However, based upon the representations of counsel, it appears that in this case the plaintiff filed suit in Idaho, rather than Oregon, because he believed, at the time, that the defendant was still an Idaho resident and was in Idaho when the allegedly negligent advice was provided.

Given this state of affairs, the Court is faced with deciding whether the plaintiff is entitled to the benefit of the "liberal construction" rule articulated in *Blimka* when construing Idaho's long-arm statute, which is manifestly aimed at providing a forum for *Idaho* residents to reach non-resident defendants. This appears to be a question of first impression in this state. Because the Court believes that the Idaho Supreme Court meant what it said when it indicated that the rule was intended to provide a forum for *Idaho* residents to vindicate their rights as against out-of-state residents in appropriate cases, the Court concludes that an out-of-state resident is *not* entitled to have section 5-514 liberally construed in favor of making this state's courts available in order to litigate a cause of action against a non-resident.¹ That said, the underlying analysis remains the same, and with the exception of the liberal construction rule, the Court will apply the legal standards set forth above in resolving the issue at hand.

A. SECTION 5-514(b), IDAHO CODE, IS NOT A BASIS FOR PERSONAL JURISDICTION. As noted previously, the plaintiff in his complaint and in his briefing argues that one possible basis of personal jurisdiction in this case is provided by section 5-514(b),

¹ One of the primary rationales justifying a state's exercise of personal jurisdiction over a non-resident is its "manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors" as a proximate result of the defendant's purposeful direction of commercial activity into the state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473-74, 105 S. Ct. 2174, 2182-83, 85 L. Ed. 2d 528 (1985) (internal quotation marks omitted, emphasis added).

covering tortious acts committed within this state. Because it is uncontested that neither the plaintiff nor the defendant were residents of this state, or located in this state, when the allegedly tortious acts occurred, section 5-514(b) cannot supply a basis for personal jurisdiction in this case.

The Court is not persuaded by the plaintiff's argument that the alleged tort should be viewed as having been committed in Idaho by virtue of the fact that its effects "can be felt in Idaho." *Plf's Memorandum Opposing Defendant's Motion to Dismiss* at p. 5. The plaintiff cites to *Blimka* for this proposition, but he has done so in error, for the portion of that case referring to an "effects" test came in relation to the Due Process clause of the federal constitution, rather than to Idaho's long-arm statute, and even if the effects test should be applied to section 5-514(b), it has no application here because the effects of the tort allegedly committed by the defendant (increased tax payments to Oregon and the federal government) are not alleged to have been experienced in or purposefully directed at Idaho. The fact that these effects *could have been* felt in Idaho, under a different set of facts than those present here, is insufficient to ground this Court's personal jurisdiction under section 5-514(b).²

B. SECTION 5-514(a), IDAHO CODE, IS NOT A BASIS FOR PERSONAL JURISDICTION. Giving the plaintiff the benefit of all reasonable inferences from the facts asserted in the affidavits, and viewing these facts in the light most favorable to him, the plaintiff sincerely believed (at the time he placed the call to the defendant in August of 2011 seeking advice) that the defendant was at that time still conducting business in Idaho. The defendant has

² The Court adds that even in the event that the plaintiff received the bad advice in question while he was physically present in Idaho, but a resident of Oregon for tax purposes, the "effect" of the advice would still more properly be characterized as being felt in Oregon than Idaho, since that is where the tax consequences would be felt.

not claimed that he made any effort to disabuse the plaintiff of this notion, or that the plaintiff had any reason to believe he had moved out of the state (although plaintiff had had no contact with the defendant for several years prior to the 2011 call). Further, although his Idaho insurance broker's or agent's license had expired by that time per his own affidavit, the defendant apparently did not tell the plaintiff he was no longer licensed in Idaho. For the purpose of the present motion, then, the facts presented show that the plaintiff called the defendant for advice related to his life insurance policy purchased many years previously, assuming that the defendant was still his insurance agent or broker, and the defendant gave the advice requested without informing the plaintiff of any of the particulars of his situation, to include the fact that he was no longer engaged in selling insurance in Idaho.

Although the Court perceives this to be a close call, it concludes that the negligence alleged against the defendant in the complaint did not "arise from" the transaction of a business for profit conducted within the state of Idaho by the defendant. Rather, the defendant, from Hawaii, gave advice to the plaintiff, located in Oregon, at the plaintiff's request, concerning an issue only tangentially related to the sale of the policy – that is, what should be done with the policy to best realize its value in light of a significant loan the plaintiff had taken from the cash value of the policy in 1999. This advice was not the "doing of an[] act for the purpose of realizing pecuniary benefit" in Idaho, since it was given to a person located in Oregon by a person located in Hawaii. The fact that the plaintiff mistakenly believed the defendant was speaking to him from Idaho is immaterial.

That said, it is undisputable that, but for the defendant's admitted transaction of a business for profit in Idaho in 1994, in the course of which the policy was sold to the plaintiff, the allegedly negligent advice in issue would not have been given from Hawaii in 2011.

However, the fact that the financial advice given in 2011 concerned the policy of insurance sold in 1994 does not indicate that the tort cause of action raised in the complaint “arose from” the sale of the policy. To say otherwise would be akin to saying that the negligent advice of an auto mechanic, speaking from Hawaii, to a plaintiff located in Oregon, to sell a certain car for scrap “arose from” the mechanic’s previous repair work on the same car in Idaho years before, simply because the plaintiff’s relationship with the mechanic began with the Idaho repairs and continued after both parties moved out of the state.

While the Court reiterates that this is an extremely close call, this Court believes, in considering various facts and circumstances particular to this case, that the transactions here are properly viewed as distinct business activities, and the latter transaction from which the plaintiff’s sole cause of action arose simply did not occur in this state as required under section 5-514(a). Accordingly, the Court lacks jurisdiction over the defendant under Idaho’s long-arm statute, and the case must be dismissed.

C. THE ASSERTION OF PERSONAL JURISDICTION OVER THE DEFENDANT WOULD VIOLATE DUE PROCESS. Even in the event that the Court erred in somewhat narrowly construing the phrase “arising from” in section 5-514, Idaho Code, particularly in regard to subsection (a) of that statute, the Court finds that it still could not take personal jurisdiction over the defendant under the standards set forth by the United States Supreme Court in *International Shoe* and its progeny. While the Due Process clause “may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed,” where a state court cannot take *general* personal jurisdiction over a defendant, it is still a necessity that the cause of action “proximately” result from the activities of the non-resident defendant in or directed at the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S.

462, 473-74, 105 S. Ct. 2174, 2182-83, 85 L. Ed. 2d 528 (1985). Thus, it is insufficient that an out-of-state defendant is shown to have carried on various business activities in the forum state (as was clearly the case with regard to this defendant), if the cause of action alleged against him is insufficiently related to those activities.

The Court finds, once more, that the advice given by the defendant in 2011 is more properly viewed as a distinct activity which neither occurred in the state of Idaho nor which was directed at Idaho residents, and hence for purposes of the present cause of action the defendant lacks the minimum contacts with the state necessary to create personal jurisdiction over him. It is undisputed that the defendant had surrendered his Idaho license at the time of the phone call, that neither the defendant nor the plaintiff were Idaho residents or physically located in Idaho when the alleged tort was committed, and that the effects of the tort were not experienced in Idaho, but rather consisted of increased tax liability to the state of Oregon and the federal government on the part of the plaintiff. Moreover, although the defendant undoubtedly “purposefully directed” commercial activity into the state of Idaho at the time the insurance policy was first purchased and for many years thereafter, by the time plaintiff called him in August 2011, it appears undisputed that these activities had largely ceased, although the affidavits do show that the defendant had not yet erased every trace of his insurance business from certain public records.

Again, the fact that the plaintiff believed, not without reason, that the defendant was advising him from Idaho and still actively conducting business there is insufficient to establish specific personal jurisdiction over the defendant, under the facts particular to this case. In short, the Court agrees with the defendant that considering the relationship among the defendant, the state of Idaho, and the cause of action, the defendant’s contacts with the state were simply too

attenuated to justify haling him into Court here on the cause of action alleged.

CONCLUSION

For the foregoing reasons, the Court finds that it lacks personal jurisdiction over the defendant, and accordingly the case is **DISMISSED**. The Court will issue a separate final judgment confirming this result. No attorney fees or costs will be awarded to either party.

SO ORDERED and dated this 7th day of October, 2013.



MIKE WETHERELL
District Judge


CERTIFICATE OF MAILING

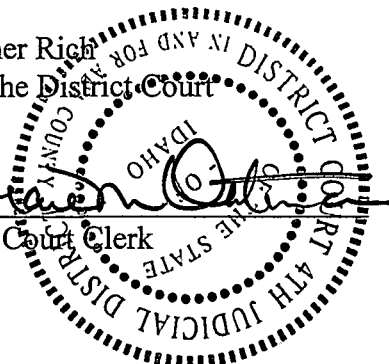
I hereby certify that on this 8th day of October, 2013, I mailed (served) a true and correct copy of the within instrument to:

MARTELLE, BRATTON, AND ASSOCIATES, P.A.
MARTIN MARTELLE
873 E STATE ST
EAGLE, ID 83616

MERRIS & NAUGLE, PLLC
J.D. MERRIS
913 W RIVER ST, STE 420
BOISE, ID 83702

Christopher Rich
Clerk of the District Court

By 
Deputy Court Clerk



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

OCT 07 2013

CHRISTOPHER D. RICH, Clerk
By DIANE OATMAN
Deputy

BILL GAILEY,

Plaintiff,

vs.

KIM WHITING,

Defendant.

Case No. CV-OC-2013-05171

FINAL JUDGMENT

For the reasons set forth in the Court memorandum decision and order issued on October

7th, 2013, the above-captioned case is hereby **DISMISSED** in its entirety.

SO ORDERED and dated this 7th day of October, 2013.


MIKE WETHERELL
District Judge

CERTIFICATE OF MAILING

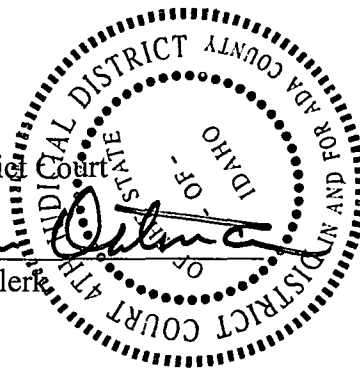
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Christopher Rich
Clerk of the District Court

By 
Deputy Court Clerk



NOV 15 2013

CHRISTOPHER D. RICH, Clerk
By JERI HEATON
DEPUTY

MARTELLE, BRATTON, and ASSOCIATES, P.A.

Martin J. Martelle ISB No. 3304
Sarah B. Bratton ISB No. 7771
Nathan H. Nielson ISB No. 9234
873 East State Street
Eagle, ID 83616
Telephone: (208) 938-8500
Facsimile: (208) 938-8503
E-mail: attorney@martellelaw.com

Attorney for Appellant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNT OF ADA

| | | |
|--------------|---|---------------------------|
| BILL GAILEY, |) | Case No. CV-OC-2013-05171 |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | NOTICE OF APPEAL |
| |) | |
| Kim Whiting, |) | |
| |) | |
| Defendant |) | |
| _____ |) | |

TO: THE ABOVE NAMED RESPONDENT, Kim Whiting; AND THE PARTY'S
ATTORNEYS, J.D. Merris of Merris & Naugle, PLLC, 913 W River Ste. 420 Boise, ID 83702;
AND THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant, Bill Gailey, appeals against the above-named respondent to the Idaho Supreme Court from the final judgment dismissing the above-captioned case for lack of personal jurisdiction on the 7th day of October, 2013, issued by Honorable Judge Mike Wetherell.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to I.A.R.

11(a)(2).

3. Mr. Gailey appeals the district court's decision to dismiss for lack of personal jurisdiction because Kim Whiting availed himself of the jurisdiction of the Courts of the State of Idaho by engaging in business with Mr. Gailey in the state of Idaho. Mr. Whiting's long-term business relationship provides this State's Courts with jurisdiction over Mr. Gailey. Honorable Judge Mike Wetherell erred in dismissing this matter. By listing this issue, Mr. Gailey shall not be prevented from asserting other issues on appeal.

5. No reporter's transcript is currently requested, however Mr. Gailey reserves the right to file a motion under I.A.R. 19(b) within 14 days of this amended notice of appeal.

6. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under I.A.R. 28.

Respondent's Motion to Dismiss for Lack of Personal Jurisdiction

Petitioner's Memorandum Opposing Defendant's Motion to Dismiss for Lack of Personal Jurisdiction and its attached exhibits.

Affidavit of Bill Gailey Opposing Defendant's Motion to Dismiss for Lack of Personal Jurisdiction

Amended Affidavit of Bill Gailey Opposing Defendant's Motion to Dismiss for Lack of Personal Jurisdiction

7. I certify:

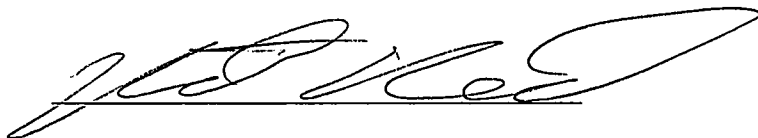
(a) That the estimated fee for preparation of the clerk's or agency's record has been paid,

(b) That the appellate filing fee has been paid, and

(c) That service has been made upon all parties required to be served pursuant to I.A.R.

20.

DATED THIS 14 day of November, 2013.

A handwritten signature in black ink, appearing to read 'Nathan H. Nielson', written over a horizontal line.

Nathan H. Nielson
Martelle, Bratton, and Associates, P.A.
Attorneys for the Appellant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BILL GAILEY,

Plaintiff-Appellant,

vs.

KIM WHITING,

Defendant-Respondent.

Supreme Court Case No. 41605

CERTIFICATE OF EXHIBITS

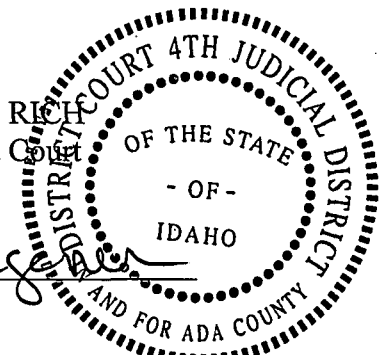
I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 18th day of December, 2013.

CHRISTOPHER D. RICH
Clerk of the District Court

By *[Signature]*
Deputy Clerk



CERTIFICATE OF EXHIBITS

000129

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BILL GAILEY,

Plaintiff-Appellant,

vs.

KIM WHITING,

Defendant-Respondent.

Supreme Court Case No. 41605

CERTIFICATE OF SERVICE

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD

to each of the Attorneys of Record in this cause as follows:

NATHAN H. NIELSON

ATTORNEY FOR APPELLANT

EAGLE, IDAHO

J. D. MERRIS

ATTORNEY FOR RESPONDENT

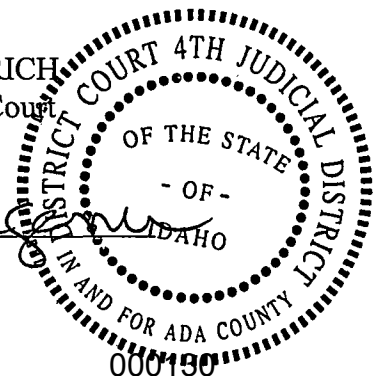
BOISE, IDAHO

Date of Service: DEC 18 2013

CERTIFICATE OF SERVICE

CHRISTOPHER D. RICH
Clerk of the District Court

By [Signature]
Deputy Clerk



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BILL GAILEY,

Plaintiff-Appellant,

vs.

KIM WHITING,

Defendant-Respondent.

Supreme Court Case No. 41605

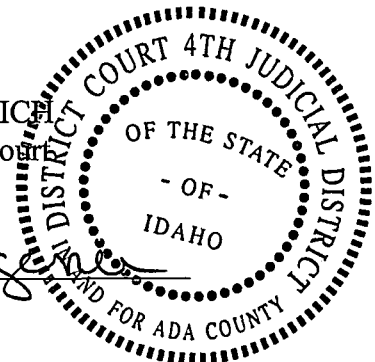
CERTIFICATE TO RECORD

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsel.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 15th day of November, 2013.

CHRISTOPHER D. RICH
Clerk of the District Court

By *V. Segura*
Deputy Clerk



CERTIFICATE TO RECORD

000131